Supreme Court, U.S.
FILED

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No. ___

IN THE

Supreme Court of the United States

FRED PARKER, *et al.*,

Appellant,

v.

STATE OF OHIO, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether only Supreme Court holdings, rather than circuit court holdings, bind statutory three-judge district courts, precluding the doctrine of stare decisis commanding that district courts strictly follow the precedents of the circuit in which the statutory three-judge district court convenes.

2. Whether Section 2 of the Voting Rights Act (sometimes hereafter referred to as the "VRA" the "Act" or "§ 2") permits minority voters to maintain a claim for vote dilution under the Act when minority voters constitute less than a majority of the voting age population, but are sufficient in number and politically cohesive to be able to otherwise elect their preferred candidate for State General Assembly under a different redistricting scheme in conjunction with like-minded non-minority voters within the same geographically compact area.

3. Whether a state apportionment redistricting board violates the 14 and 15th Amendments to the United States Constitution when its majority members pay $44,000.00 to the private company of an individual who is the State Coordinator for Redistricting for the National Association for the Advancement of Colored People ("NAACP") (Ohio Conference of Branches) in his private capacity but on condition that he retain his position with the NAACP implicitly to secure the organization's endorsement of the proposed reapportionment plan of the majority members.

4. Whether a state apportionment board violates the 14th and 15th Amendments to the United States Constitution when one of majority member's chief agents states that the majority members made changes in redistricting to ensure that 13,000 African-Americans who were formerly within a Democratic-controlled House district, were replaced by 14,000 Republicans (non-minorities) to ensure a Republican victory within the same House district.

PARTIES

All parties to the proceeding below are:

Appellants

FRED PARKER
LEIGH E. HERINGTON, in his capacity as a Member of Ohio Apportionment Board
RHINE L. MCLIN
MARK MALLORY
RAY MILLER
JOYCE BEATTY
TYRONE YATES
SYLVESTER PATTON
PRESTON STEARNS
DEMETRIUS GORHAM
JEANNETTE HARRISON
VERNA WATKINS
FRAN DENNIS
SUSAN UPTON FARLEY

Appellees

THE STATE OF OHIO;

OHIO APPORTIONMENT BOARD

ROBERT A. TAFT, II, in his official capacity as Chairman of the Ohio Apportionment Board
SCOTT P. BORGEMENKE, in his official capacity as Secretary of the Ohio Apportionment Board
J. KENNETH BLACKWELL, in his official capacity as Member of the Ohio Apportionment Board
JIM PETRO, in his official capacity as Member of the Ohio Apportionment Board
LARRY HOUSEHOLDER, in his official capacity as Member of the Ohio Apportionment Board

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JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

This is an appeal from the order of a three-judge panel of the U.S. District Court for the Southern District of Ohio denying Appellants' request for declaratory and injunctive relief, seeking invalidation of the 2001 Apportionment Plan for the Ohio General Assembly for violations of § 2 of the Voting Rights Act and the Fourteenth and the Fifteenth Amendments to the U.S. Constitution. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973.

OPINIONS BELOW

The decisions of the three-judge panel of the United States District Court for the Southern District of Ohio are reported at 263 F.Supp.2d 1100 (S.D.Ohio 2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal also involves § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 and the 14th and 15th Amendments to the U.S. Constitution. The texts of these provisions are set forth in the Appendix.

Article XI of the Ohio Constitution provides that certain State-elected officers serve upon the Ohio Apportionment Board, which convenes following the decennial census. The text of Article XI is set forth in the Appendix.

STATEMENT OF THE CASE

This is an appeal under § 2 of the Voting Rights Act of 1965, as amended, and the Fourteenth and Fifteenth Amendments on account of the unlawful and unconstitutional apportionment of the Ohio General Assembly. Appellants are requesting that this Court unequivocally recognize so-called "influence" district claims under § 2 of the Voting Rights Act. Appellants filed this action on November 15, 2001 seeking declaratory and injunctive relief alleging violations of § 2 of the Voting Right Act and of the Fourteenth and Fifteenth Amendments of the Constitution. Appellants subsequently filed a Second Amended Complaint that generally asserts that the Ohio Apportionment Board Adopted Plan of Apportionment for the Ohio General Assembly dilutes the ability of Ohio's African American voters to elect candidates of their choice. Specifically, Appellants challenge House Districts 19, 20, 21, 25, 26, 27, 28, 29, 31, 32, 33 and 60. Appellants also challenge Senate Districts 5 and 15.

Article XI of the Ohio Constitution provides that certain state-elected officers serve upon the Ohio Apportionment Board, which convenes following the decennial census. Appellant, State Senator Leigh Herrington, was the sole Democratic member of the Ohio Apportionment Board, which consisted of Appellees Governor Robert A. Taft, Secretary of State J. Kenneth Blackwell, former State Auditor Jim Petro and Ohio Speaker of the House Larry Householder.

Article XI of the Ohio Constitution mandates the Apportionment process, however, each state must comply with the provisions of the 15th Amendment to the US Constitution and the Voting Rights Act.

This appeal is essentially bifurcated into two claims. The first claim concerns the State's intentional discriminatory acts during the 2001 reapportionment of Ohio in violation of the 14th and 15th Amendments to the U.S. Constitution. The second claim concerns the adopted plan of reapportionment, which violates § 2 of the Voting Rights Act. The Appellees' violation of the Constitution is illuminated in the plan it adopted.

Facts Relevant to 14th and 15th Amendment Violation

Sometime before the members of the Apportionment Board officially convened, the House Republican Caucus created a body called the Legislative Task Force on Redistricting, Reapportionment, and Demographic Research (the "Task Force"), of which Appellee Householder was a member. On June 27, 2001, the Task Force entered into a contract with an individual, Floyd B. Johnson, purportedly the NAACP State Coordinator for Redistricting and Reapportionment for the Ohio Conference of NAACP Branches. The contract provided that the Task Force would pay Mr. Johnson's private company $44,000 to consult with them *so long as* he was appointed and remained the NAACP State Coordinator (the "NAACP Contract"). In the event that he no longer held that position, the contract would terminate. Mr. Johnson, however, never disclosed to any official of the NAACP that he was receiving $44,000 for his *voluntary* position within the civil rights organization.

The Ohio Apportionment Board convened on August 2, 2001, elected Scott Borgemenke secretary, and announced a series of short, public hearings to be held around the state on August 20 through 24, 2001. The Apportionment Board held

hearings in 10 cities—Toledo, Findlay, Cleveland, Akron, Canton, Cincinnati, Dayton, New Concord, Newark and Columbus. Several of the Apportionment Board Members appointed individual designees to attend the hearings on their respective behalves.

Mr. Johnson appeared and testified at each hearing purportedly on behalf of the NAACP, but never disclosed to the full Apportionment Board or to Appellant Herrington that he was a paid consultant to the Republican members of the Task Force. According to the Board's amended rules and procedures, persons desiring to submit apportionment plans for consideration by the Board were required to do so by September 24, 2001. The Board was to make the submitted plans available to the public on September 25, and it conducted its "plan presentation" hearing on Wednesday, September 26, 2001.

Appellee Blackwell's questions to Mr. Johnson during the final public hearing provided him with the prompt that he needed to give his purchased endorsement of the adopted Plan.

> SECRETARY BLACKWELL: Mr. Johnson, you've had a chance to review the majority plan. Since the geography and your plan as compared to the majority plan is slightly different in some areas, can you tell me if the majority plan accomplishes the NAACP's objectives?
>
> MR. JOHNSON: I would fully support that.
>
> . . .
>
> SECRETARY BLACKWELL: Do you believe the majority plan as submitted preserves existing opportunities or *expands opportunities for minorities to be elected* to the legislature here in Ohio? (emphasis added)

MR. JOHNSON: Yes, and "opportunity" is the key word.

SECRETARY BLACKWELL: Thanks.

Within that short exchange, Mr. Johnson fulfilled his implicit obligation under his contract with the Republican Task Force to deliver the NAACP endorsement.

Brett Buerck was Chief of Staff to Appellee Householder, a Task Force member and signatory on the NAACP Contract. Even though he served as Appellee Householder's official designee for each of the public hearings, he never disclosed to Appellant Herrington or acknowledged during any public hearing that Mr. Johnson was a paid consultant of the Task Force, rather than the voice of the NAACP. However, Mr. Buerck had informed the designees and representatives of the Republican Apportionment Board members that Johnson was a paid consultant before Mr. Johnson testified.

The Apportionment Board directed Appellee Scott P. Borgemenke to draft and submit a plan on their behalf. Appellee Borgemenke had no prior experience in redistricting, had no background in redistricting or ecological regression analysis, or any other relevant training or experience within his background to suggest that he was in a position to comply with the Ohio and Federal Constitutions and the Voting Rights Act. In fact, the Apportionment Board did not give Mr. Borgemenke any instructions concerning the implications of the Voting Rights Act, Ohio's remedial district in Mahoning County, Ohio, majority-minority districts or influence districts. Furthermore, although Borgemenke had been informally introduced to Mr. Johnson prior to submitting the Majority Members' Plan, Mr. Johnson provided him with little to no input or "consultation" despite the NAACP Contract.

Appellant Herrington discovered the NAACP Contract shortly prior to the vote on the Majority Members' Plan. At the next available Apportionment Board meeting, Appellant

Herrington raised the issue of Mr. Johnson's conflict of interest and the implications of an apparent attempt to deceive the public into believing that the NAACP, the nation's oldest and most prominent civil rights organization, actually approved of the Appellees' Plan and that it had a positive impact on African-American voters.[1] Despite objections by Senator Herrington, the Apportionment Board passed the Plan, notwithstanding the lack of any genuine or meaningful input from the NAACP, a factor which the Ohio Apportionment Board placed heavy reliance upon in formulating the 1991 Ohio Plan.

The intent of Mr. Johnson's presence was to create the illusion that the NAACP had sent its uncompromised representative to ensure that the power of the African-American vote was not being diluted. The public had every reason to believe that the foremost voting and civil rights organization in the United States would fulfill its mission without respect to party or money. Meanwhile, the members of the Apportionment Board, save Appellant Herrington, their designees, Mr. Johnson and Appellee Borgemenke casually watched the charade unfold without ever disclosing that Mr. Johnson was their paid consultant; not the uncompromised voice of the NAACP.

Mr. Johnson's role was never intended to actually provide any valid input into the adopted Plan. Mr. Johnson's plan should have been labeled the "Starcomm Plan" (the name of his private company that received the $44,000) rather than that of the NAACP or all of Ohio's African-Americans. He never cleared his Starcomm Plan with any branches of the NAACP before submitting it to the Board. Moreover, there is no validating evidence that the Ohio Conference of Branches even approved his plan after the Board adopted its 2001 Plan

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[1] In *Voinovich v. Quilter*, this Court noted that it was unlikely that the 1991 Plan could be unfair to African-Americans because the NAACP and groups of Black elected officials would not have endorsed it.

other than a self-serving letter from Mr. Johnson to Appellee Borgemenke.

In addition to the problematic role of Floyd Johnson, in March 2002, Appellee Householder's Apportionment Board Designee, Mr. Buerck initiated a phone call with Douglas E. Mink, in which Mr. Buerck, in great detail, indicated that the Majority Members of the Board looked at race as the predominant factor during the reapportionment process.[2] In fact, Mr. Buerck detailed the "problem" of having a high black voter turnout in Hamilton County (Cincinnati), specifying that the unprecedented level of black voter turnout in inner cities across the country and in Cincinnati caused Republican candidates to lose in House districts in the Cincinnati area. Mr. Buerck then boldly stated:

> Because of the changes that we've made in redistricting to help Jim [Raussen] we essentially took 13,000 African Americans out of the Raussen district and put 14,000 Republicans in.

Mr. Buerck further indicated during his conversation with Mr. Mink that Appellee Taft would be contacting him, and fully supported his position.

The public reapportionment hearings were a sham in which the Apportionment Board sought a rubber stamp of approval from the NAACP of a redistricting plan that purposefully diluted the African-American vote. Coupled with a high-ranking State official's admissions, race was clearly the pre-

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[2] Mr. Mink initially asserted his 5th Amendment privilege against self-incrimination during his deposition on the matter; however, Mr. Buerck has admitted to his participation in the conversation and has admitted to the accuracy of the transcript of the recorded conversation appearing on a television station's website. The purpose of the conversation was to convince Mr. Mink to drop out of the 2002 House Republican primary in Cincinnati. Under the supervision of the District Court, Mr. Mink confirmed that the conversation took place, the purpose of Mr. Buerck's call, and the asserted facts during the call.

dominate factor in the 2001 apportionment. On Monday, October 1, 2001, the Republican majority of the Board met and adopted its plan (hereafter "Appellees' Plan") over the others.

Facts Relevant to § 2 of the Voting Rights Act

Appellants' claims concerning the Ohio House and Senate Districts under § 2 are summarized below. At issue is the Appellees' disenfranchisement of voters in House districts in Mahoning, Franklin, and Hamilton Counties. The Appellees' Plan also disenfranchises voters in Senate districts located in Franklin and Montgomery Counties.

1. *Mahoning County House Seat*

The Appellees' Plan created House District 60 to contain an African American population of only 33.6%. Over 10 years ago, another three-judge panel detailed the history of racial discrimination in Mahoning County and its effects in *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991. This Court held that the urban Youngstown districts as drawn under the 1981 re-apportionment violated the Voting Rights Act and the Fifteenth Amendment, and retained jurisdiction to determine whether the revised 1981 re-apportionment was constitutional and legal. The Appellees' Plan once again decreases the percentage of African Americans, lessening their ability to influence the outcome of the election in the district and elect the candidate of their choice. In light of the continuing remedial goals of *Armour*, the new apportionment cannot pass muster.

2. *Franklin County House Seats*

The Appellees' Plan substantially dilutes the voting power of African Americans in Franklin County by creating several districts, each of which contains a relatively small percentage of African-Americans: 19th—9.5%, 20th—13.6%, 21st—14.8% and 25th—10.1%. While diluting African American

votes in these areas, the Appellees' Plan packs two Franklin County districts with higher percentages of African-Americans than are needed to elect the candidate of their choice: 26th—51.4% and 27th—47.1%. By drawing the district boundaries differently, the Appellees could have created three districts in central Franklin County with large enough populations of African Americans to elect the candidate of their choice.

3. *Franklin County Senate Seat*

Each Senate District must consist of three contiguous House Districts pursuant to Article XI of the Ohio Constitution. After fragmenting the African American population of Franklin County into the six House Districts described above, the Appellees' Plan combined House Districts 25, 26 and 27 to create Senate District 15, which has an African-American population of 36.3%. Had the Appellees' Plan instead created three, effective minority House Districts, it could have created a Senate District with a higher percentage of African-American voters instead of diluting the African-American vote.

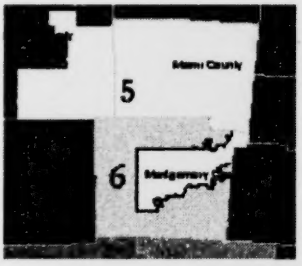
4. *Hamilton County House Seats*

The Appellees' Plan dilutes the African-American vote in Hamilton County. The plan creates only two of Hamilton County's eight districts to allow African-American voters have the ability to influence elections. Voters are packed into those two districts, which are nearly 50% African American. By setting different boundaries, the Appellees' plan could have created a third district out of the eight, which would contain a large enough percentage of African Americans to elect the candidate of their choice.

5. *Montgomery County Senate Seat*

The Appellees' Plan created Senate District 5 with an African American population of 30%. The district combines

two House Districts primarily in urban Dayton with a House District that contains all of rural Miami County and part of rural Darke County. The Appellees' Plan accomplishes this feat by extending its new House District 40 up to the Northeast corner of Montgomery County so that it is contiguous with House District 79, which encompasses Miami County and part of Darke:



In the meantime, the Appellees' Plan creates Senate District 6 out of the surrounding suburbs of Dayton, which are House Districts 36, 37 and 38. This is classic gerrymandering—joining the urban population of central Dayton with the rural and farming population of Darke County. The Appellees could have created three house districts wholly within Montgomery County that together would have afforded the African Americans of Montgomery County, who reside primarily in urban Dayton, a sufficient plurality to elect the candidate of their choice.

TRIAL COURT PROCEEDINGS

The Court required that direct and cross-examination testimony of all non-party lay witnesses be presented in advance of trial through transcripts of depositions. The parties also exchanged expert reports prior to trial. The Court, however, did permit oral argument and live testimony from selected lay witnesses and expert witnesses. Oral arguments related to Appellees' motion for summary judgment occurred on September 30, 2002 before the panel. The trial commenced immediately thereafter on October 1 and 2, 2002 before the panel.

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In a 2—1 decision on May 23, 2002, two members of the District Court's panel held that Appellants could not maintain a Voting Rights Act claim under § 2 because the Sixth Circuit does not recognize so called "influence district" claims. Specifically, Judges Martin and Graham cited to *Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998, which stated, *in dicta*, "we do not feel that an 'influence' claim is permitted under the Voting Rights Act." Judge Martin further opined, "Because influence claims are not cognizable in our circuit and the plaintiffs have failed to establish the first *Gingles* precondition, we see no need to discuss whether or not plaintiffs' satisfy the second and third preconditions. The second and third preconditions. The plaintiffs' claim under Section 2 of the Voting Rights Act must fail."

Judge Gwin, however, noted "[the] *Sundquist* Court's discussion of the first *Gingles* condition is obvious dicta." Judge Gwin also noted the unsettled question of law—that is, whether Sixth Circuit's opinion in *Sundquist* controls the District Court at all as *stare decisis* when, pursuant to 28 U.S.C. § 2284, Congress provides for direct review by the Supreme Court, by passing the Circuit Court of Appeals altogether.

Judge Gwin also concluded that § 2 of the Voting Rights Act does not foreclose "influence district" claims.

> * * * Congress directed courts to consider nine explicit factors when determining the validity of a Section 2 claim. In setting out factors for Courts to consider, Congress set no requirement as to the percentage of voters minority populations must have before they could challenge an election practice. Instead Congress directed courts to consider "the totality of circumstances."
>
> * * *
>
> If required to decide, by the facts presented herein, I would find strong support for allowing influence district

> claims. Most important, nothing suggests that Congress intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters. The Supreme Court also suggested that a minority influence claim may be sufficient to sustain a Section 2 results claim.

The District Court unanimously held that Appellants' evidence regarding Messrs. Buerck and Johnson, in connection with their roles and actions in Appellees' reapportionment, was insufficient to show that race was a predominant factor in devising the redistricting plan. The District Court reasoned that it must presume that the State of Ohio acted in good faith until a sufficient showing is otherwise made. The District Court glossed over the roles of Messrs. Buerck and Johnson, determining, in essence that their roles were insignificant for purposes of the Fourteenth and Fifteenth Amendments.

However, Mr. Buerck's role could not have been more understated in the Ohio reapportionment process. The evidence established that he: 1) served on the Task Force; 2) served as Appellee Householder's official designee during all the public hearings on reapportionment; 3) signed the contact with Mr. Johnson, which conditioned payment on Mr. Johnson's appointment as redistricting coordinator for the NAACP; 4) advised only the Republicans participating in the hearings of Mr. Johnson's dual role; 5) personally researched African-American voter turnout in Hamilton County following the 2000 presidential election; 6) concluded that African-American voter turnout was at unprecedented levels during the 2000 Presidential election; 7) attributed several Republican losses in Hamilton County to African-American voter turnout; and 8) bragged to a potential Republican candidate that Appellees consciously drew House districts in Hamilton County to dilute African-American influence in elections in favor of Republican potential candidates.

The District Court ignored the fact that the changes to the Hamilton County districts that Mr. Buerck referred to were, in fact, re-drawn to dilute African-American voting influence by including groups of White voters, mainly from former Republican dominated House districts, with the African-Americans within House District 28. The purpose of this was, in fact, to dilute African-American voting strength. The fragmentation of the same voters he referred to had a neutralizing effect on African American voting strength in the next House elections.

Mr. Johnson's role was no less significant. Mr. Johnson never disclosed his role as a paid consultant to the full Apportionment Board during the public hearing. Furthermore, he repeatedly referred to his role as an appointed official of the NAACP. He also submitted his redistricting plan under the NAACP letterhead and logo even though not a single NAACP elected official had seen it, reviewed it or authorized it. Even more disturbing, Mr. Johnson's submission included language that he was working on behalf of the NAACP and all African Americans in Ohio. He never mentioned Starcomm.

Clearly, his role was meant to create the impression among the public, including African-Americans, that the voting rights of African-Americans in Ohio were being protected by the nation's oldest, most-reputable civil rights organization, the NAACP. The opposite was occurring.

THE QUESTIONS ARE SUBSTANTIAL

1. The District Court held, in effect, that the Sixth Circuit's precedent in Voting Rights Act cases were binding authority. Based upon one case, *Cousins v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998, which stated in dicta that "we do not feel that an 'influence' claim is permitted under the Voting Rights Act," two members of the District Court panel foreclosed any analysis of Appellants' influence district

claims, Judges Martin and Graham. The Court also relied upon another three-judge district court to support its negotiation of Appellants' claims. *O'Lear v. Miller*, 222 F.Supp. 2d 850, 860-61 (E.D.Mich. 2002). The District Court majority stated:

> Because influence claims are not cognizable in our circuit and the plaintiffs have failed to establish the first Gingles precondition, we see no need to discuss whether or not plaintiffs satisfy the second and third preconditions. The plaintiffs' claim under Section 2 of the Voting Rights Act must fail.

However, Appellants and Judge Gwin noted several inconsistencies in the majority's strict adherence to stare decisis in the context of a three-judge district court. Judge Gwin noted in his concurrence that at least one statutory three-judge district court has held that only the Supreme Court's decisions can bind a statutory three-judge district court. (citing *Jehovah Witnesses in Washington v. Kings County Hospital*, 278 F.Supp. 488, 502-03 (W.D.Wash. 1967). Judge Gwinn correctly highlights the issue—the majority of the "three judge district courts follow circuit precedent without clear explanation of why such precedent should control courts who are not reviewed by those circuits."

This appeal presents a substantial question, the answer to which will clear confusion. The District Court in this case would have analyzed the Appellants' claims but for the dicta language in *Cousins*. The District Court even recognized that the Supreme Court has not foreclosed the possibility of §2 influence district court claims, and other courts, including one within the Sixth Circuit, have recognized influence district claims. *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Johnson v. DeGrandy*, 512 U.S. 997, 1009, 114 S.Ct. 2647, 129 L. Ed.2d 348 (1991); *Uno v. City of Holyoke*, 72 F.3d 973, 976 (1st Cir. 1995); *Armour*, 775 F. Supp. at 1052. The Supreme Court's decision concerning

precedential value of circuit decisions in three judge panel district courts would eliminate the inconsistencies in the dispensing of justice in the voting rights context.

2. The Supreme Court should recognize the viability of § 2 influence district claims. Factors in assessing a minority group's opportunity to participate in political processes, as part of determination whether a legislative redistricting plan results in vote dilution in violation of Voting Rights Act, include whether a plan adds or subtracts "influence" or coalitional districts, comparative position of legislative leadership, influence and power for representatives of benchmark majority-minority districts, and whether representatives elected from districts created and protected by Act support plan. *Georgia v. Ashcroft*, 123 S.Ct. 2498 (2003) (citing Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.)

The District Court expressed that influence district claims are not recognized in the Sixth Circuit. However, as stated by the First Circuit in *Uno v. City of Holyoke*, 72 F. 3d 973, 979, ftn.2 (1st Cir. 1995):

> The lower courts are divided on the subject, compare *Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (three-judge panel) (recognizing influence dilution claim) with *McNeil v. Springfield Park Dist.*, 851 F. 2d 937, 947 (7th Cir. 1988) (rejecting influence dilution claim), cert. denied, (490 U.S. 1031, 109 S. Ct. 1769, 104 L. Ed. 2d 204 (1989), and the Supreme Court has declined on four occasions to decide whether such claims are cognizable under VRA § 2. *See DeGrandy*, 512 U.S. at __. 114 S. Ct. at 2656: *Voinovich*, 507 U.S. at 156-160, 113 S. Ct. at 1157-58: *Growe v. Emison*, 507 U.S. 25, 41 n.5, 113 S. Ct. 1075, 1084 n.5, 122 L. Ed. 2d 388 (1993): *Gingles*, 478 U.S. at 46-47 n. 12. 106 S. Ct. at 2764 n. 12. We take no view of the matter today (although we do discuss the potential relevance of evidence from elections in a particular "influence district" on the Appellants' claims, see infra Part V).

The District Court placed far too much reliance on comments made by the panel in *Sundquist,* 145 F. 3d 818. The comments in that decision are clearly *dicta.* In fact, the panel reversed the District Court on the basis of its holding that the third *Gingles* precondition had been met. The Court went on to state that, "We could, therefore, stop our inquiry, reverse the judgment, and vacate the district court's order at this point. However, . . . we find it proper and perhaps necessary, to express our views concerning the two alternative remedies proposed in this case. . ." A portion of the Opinion relied upon by Appellees is where the panel is expressing its "views" regarding whether influence claims are cognizable. As *dicta*, these comments are not controlling.

More recently, the New Jersey Supreme Court stated:

> Although the Supreme Court has heretofore declined to decide whether an influence dilution claim is cognizable under the VRA we believe that Georgia v. Ashcroft supports our conclusion that such claims are permitted. After all, Congress enacted the VRA for the remedial purpose of "rid [ding] the country of racial discrimination in voting." *South Carolina v. Katzenbach,* 383 U.S. 301, 315, 86 S.Ct. 803, 812, 15 L. Ed.2d 769, __ (1966). The VRA should be interpreted in a manner that provides "the broadest possible scope" in eliminating discrimination against minority voters. *Allen v. State Board of Elections,* 393 U.S. 544, 567, 89 S.Ct. 817, 832, 22 L. Ed.2d 1, __ (1969). Those principles were reaffirmed recently when the Court restated that "[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. . . . [T]he Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters." *Georgia v. Ashcroft, supra,* 539 U.S. at __, 123 S.Ct. at __, __ L. Ed.2d at __, 2003 WL 21467204 at *18 (citations

> omitted). Influence dilution claims will hasten the time when race will not matter.

MacNeil v. Legislative Apportionment Commission of the State of New Jersey, __ A.2d __, 2003 WL 21755057, at *11 (July 31, 2003).

Given that the view expressed by the panel in *Cousin* is only *dicta*, Appellants respectfully argue that the reliance placed on the views stated therein by the three judge court in the recent case of *O'Lear v. Miller*, 2002 WL 1052046 (E.D.Mich.) is misplaced. Whether claims involving districts containing less than a majority of African-American's are cognizable under Section 2 must be determined by looking at the purposes of the Voting Rights Act and asking whether the election practice being challenged, in this case district lines, deprives African-American voters of an equal opportunity to elect the candidate of their choice.

In *Thornburg*, the Supreme Court stated at n. 12:

> We note that we have no occasion to consider whether the standards we apply to respondents' claim that multi-member districts operate to dilute the vote of geographically cohesive minority groups . . . are fully pertinent to other sorts of vote dilution claims, *such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more . . . single member districts resulted in the dilution of the minority vote*. (Emphasis supplied.)

The Supreme Court also later determined in *Growe* that while *Gingles*' preconditions applied to single member claims, the question of their application to influence claims remained open. The Court had stated that § 2 claims require district courts to employ a highly individualistic analysis. In this connection, the Court found as follows:

> [I]n evaluating a statutory claim of vote dilution through districting, the trial court is to consider the 'totality of

> circumstances' and to determine based 'upon a searching practical evaluation of the past and present reality' . . . whether the political process is equally open to minority voters. 'This determination is peculiarly dependent upon the facts of each case' . . . and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms . . . *[and] particularly familiarity with the indigenous political reality.*

Thornburg v. Gingles, 478 U.S. 30 (1986). (emphasis added).

"The question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality' . . . and on a "*functional*" view of the political process." *Thornburg*, 478 U.S. 30 (1986).

The above language from *Thornburg* suggests that Section 2 claims may arise in many contexts. The following passage from an article that appeared in a highly respected scholarly journal furthers this proposition:

> The language of the amended statute, and of the cases on which the Senate relied, suggests that Congress intended to protect a broad conception of the political process. *White* and *Zimmer*, as noted above, were concerned with activities both prior and subsequent to the actual election. Reflecting these cases, the statute refers to the openness of the "political processes leading to nomination or election" and the equal opportunity to participate in that process, as well as the opportunity 'to elect representatives of [one's] own choice.' Similarly, the legislative history of the provision emphasizes the concern with providing minorities the 'same opportunity to participate in the political process as other citizens enjoy' and preventing the 'denial of access to any phase of the electoral process for minority group members.' While the legislative history makes references to the 'voting strength' of minority groups, and the opportunity of such groups to elect their preferred candidates, *Congress intended these references to be merely*

> *illustrative of one phase of the protected activity, rather than indicative of the central focus of the provision.*

See, Abrams, "Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U.L. Rev. 449, 459 (1988). (Emphasis supplied.)

The essence of a Section 2 claim is unequal opportunity to elect a candidate of choice. The opportunity to elect is not equal if district lines are drawn in such a way that the result is that minority voters are not able to usually elect the candidate of their choice. The Voting Rights Act does not define equal opportunity to elect. In *Gingles*, the Court stated that Appellants must be able to make a threshold showing that minorities could constitute a majority in a different district. However, the Court developed this factor in the context of a challenge to districts in a State where it was necessary for a candidate to receive more than 50% of the votes cast in order to be elected. Therefore, an initial showing that minorities could constitute a majority of the voters in a new district made some sense in that context.

However, in Ohio, a candidate is not required to receive a majority of the votes cast in order to be elected, but only a plurality of the votes cast. In plurality states, African-American's may be able to elect the candidate of their choice even though they constitute less than 50% of the voters in the district. However, where districts in such states are configured in such a way as to fragment African-American voters so that they will not be able to elect the candidate of their choice, they are denied equal opportunity under Section 2 just as much as African-Americans would be if it were possible to construct a district with a majority of African-Americans.

The evidence presented by Appellants in the instant case establishes that in each of the four counties, African-Americans are politically cohesive and voting is racially polarized. In addition, the evidence shows that it is possible

in Franklin and Hamilton Counties to construct a third district each composed of a geographically compact effective number of African-American voters. In addition, it is possible to reconfigure Senate District 5 in Montgomery County so that African-American voting strength is not diluted.

The adopted plan includes, in Senate District 5, all of Miami County and a portion of Darke County. The evidence established that the voters in these counties are not politically cohesive with African-American voters in Montgomery County. The alternative Senate District suggested by Appellants would combine three House Districts wholly within Montgomery County. Although this would not substantially change the percentage of African-American voters within the Senate District, it would prevent dilution of African-American voting strength by including a larger percentage of white voters who are not racially polarized in their voting behavior.

Finally, in Mahoning County, it is possible to reconfigure the House District lines so that the challenged district would contain approximately 1,000 additional African-American voters. This represents a significant margin within the Mahoning County district, given the prior findings by the District Court in *Armour* and given the evidence that the winner of the Democratic Primary is the *de facto* winner of the general election. Since voting in primary elections is substantially lower than voting in primary elections, the actual number of voters needed to elect a candidate at the primary is reduced.

Appellants position concerning "influence district" claims is supported by recent opinions of the Supreme Court, a State Supreme Court, at least one district court and scholarly commentary on § 2 of the Voting Rights Act. First, the Supreme Court has recently stated, "spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a

candidate of their choice. Such a strategy has the potential to increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group." *Georgia v. Ashcroft*, __ U.S. __, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). "Thus, a court must examine whether a new plan adds or subtracts "influence districts"—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process. In assessing the comparative weight of these influence districts, it is important to consider "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Id.* (internal citations omitted). Although the Supreme Court was analyzing this case under §5 of the Voting Rights Act, the Supreme Court has consistently held that cross-applied standards for Voting Rights analysis irrespective of state of origin.[3]

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[3] "While we acknowledge that Section 5 of the VRA is not in issue here, we nevertheless think it plain that the methodology of creating election districts as described by Justice O'Connor in *Georgia v. Ashcroft* necessarily serves as the predicate of a state's obligation of compliance with Section 2(a). That is to say, "unpacking," or distributing the voting strength of minority groups not only into majority or safe districts but also into coalition or influence districts, is as much a tool of legislative apportionment, meeting the mandate of Section 2, as is "packing," or creating only safe majority districts. In our view, therefore, depriving the Commission of the "unpacking" tool would constitute an undue restraint on its reapportionment planning in contravention of the aims and policies of the VRA. We also think it plain that, because Newark and Jersey City constitute the largest municipal concentration of minority voters in this State, the two-district limitation of the State Constitution would deprive the Commission of the redistricting tool of "unpacking," a tool that is *now* recognized by the United States Supreme Court as one which the states *must* be free to employ if they deem it appropriate in order to protect and promote the electoral rights and interests of minority groups." *MacNeil v. Legislative Apportionment Commission of the State of New Jersey*, __ A.2d __, 2003 WL 21755057, at *10 (July 31, 2003).

One scholarly article proposed a three-part test consistent with this Court's opinion in *Gingles* and the Senate Report factors with respect to influence dilution claims that warrant § 2 protection. "[Courts] should first examine the minority group's cohesiveness. Second, courts should scrutinize the "geographic compactness" of the proposed influence district. Lastly, courts should assess the potential for interracial coalitions, crossover voting, and/or a minority swing vote. As an additional factor, courts should ensure that proposed influence districts do not disturb majority- minority districts. Once plaintiffs establish all three requirements and fulfill the additional proviso regarding majority-minority districts, courts may proceed to the 'totality of circumstances' inquiry under S 2." Stanley Pierre-Louis, *The Politics of Influence: Recognizing Influence Dilution Claims Under § 2 of the Voting Rights Act,* 62 U. Chi. L.Rev. 1215, 1234 (1995).

The evidence in this case also establishes that African-Americans have been able to elect the candidate of their choice when there are effective districts, meaning districts containing a sufficient number of African-American voters so as to have an equal opportunity to elect a candidate of choice. In terms of the districts analyzed, the choice of African-American voters usually prevailed. However, as Dr. Handley testified that the corrollary to this is that in the absence of effective districts, white voters would usually defeat the candidate of choice of African-American voters.

A 50% quota or threshold is nonsensical in that a voter in one district having 57,339 [4]African-American voters can bring a § 2 claim, but a voter in a neighboring district with 57,338 African-Americans may not bring a § 2 claim. Given the permissible variance under the Ohio Constitution, an

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[4] The ideal legislative district size in Ohio, based on population and census data, is 114,678. A variance of 5%, or 5,733, is permissible. Therefore, districts may vary from 120,411 to 108,945.

African-American voter in a district having 60,205 African-Americans (at the maximum variance possible) would be barred from bringing a § 2 claim, but an African-American voter in a district having 54,473 African-Americans(at the minimum variance) could sustain a § 2 claim. There is no logic attached to this methodology, and the Voting Rights Act does not require it. However, Ohio has interpreted § 2 in this manner to the detriment of Appellants.

3. Questions Presented 3 and 4 are substantial for purposes of 15th Amendment jurisprudence because they concern the very integrity of the voting process in Ohio. As explained by Professor Paul J. Cook, Ohio has had a history of racial discrimination in voting through Black Codes and other means. Clearly, Ohio's African-American voters have an interest in fundamental fairness at all levels of government, and especially in voting rights.

The appellees' agents sought to purchase the endorsement of the nation's oldest and most prominent civil rights organizations without actually deserving the endorsement. Rather than seeking the advice and counsel of NAACP leaders such as Appellant Fred Parker, then-president of the Columbus, Ohio Chapter of the NAACP, Appellees paid an unknown appointed official of the NAACP Ohio Conference of Branches $44,000.00 for his endorsement. Appellees blatantly conditioned a private payment upon a "volunteer" maintaining his position with a "volunteer" non-profit civil rights organization. What's worse, Mr. Johnson never informed the NAACP officials that he was being paid $44,000.00 for what they expected him to do on a voluntarily basis as their independent representative.

The Supreme Court has placed great emphasis on the testimony and credibility of the NAACP and Black elected officials in government in voting matters. *See Voinovich v. Quilter*, 507 U.S. 146, 160, 113 S.Ct. 1149, 1158-59, 122 L.Ed.2d 500 (1993) (Ohio Apportionment Board unlikely to

engage in or tolerate intentional discrimination against black voters since it relied on sources that would not so tolerate such as the Ohio NAACP the Black Elected Democrats of Ohio and Black Elected Democrats of Cleveland, Ohio); *Georgia v. Ashcroft*, __ U.S. __, 123 S.Ct. 2498, 2507, 156 L.Ed.2d 428 (2003) (placing great emphasis and weight upon the testimony of Congressman John Lewis who testified about whether the Georgia Senate redistricting plan increased minority voting strength). Appellees sought to purchase the credibility of the NAACP at a cost borne by Ohio's African-American voters.

Appellants presented testimony against the Appellees' Plan by several Black elected officials, including Appellants I. Ray Miller, Rhine McClin, Mark Mallory, Joyce Beatty and Sylvestor Patton. Each objected to the Appellees' Plan, and each are Black elected officials in Ohio. Appellees had no African-American elected officials provide any testimony of evidence in support of their reapportionment plan. In fact, the only support of the Appellees' Plan came from the purchased endorsement of Mr. Johnson.

Coupled with Mr. Johnson's role, Mr. Buerck's boast of racial gerrymandering in House District 28 illuminates the secret motives of Appellees. While the District Court glossed over the recorded statements of Appellee Householder's designee, from an accuracy standpoint, the District Court did not address whether Appellees did, in fact, intentionally draw the Cincinnati districts to dilute the voting strength of African-Americans.

The District Court limited its analysis on Appellants' 14th and 15th Amendment claims to three sentences, simply concluding that Appellants had not put forth sufficient evidence to prove those claims. The District Court did not consider the differences between the 1991 and 2001 plans, the impact of the *Armour* case in Mahoning County, or the racial implications in the Montgomery County Senate District.

CONCLUSION

For the foregoing reasons, Fred Parker and the remaining Appellants, respectfully request that the Court note jurisdiction in this matter, set the case for full briefing and argument, and reverse the May 23, 2002 judgment of the District Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
S.D. OHIO
EASTERN DIVISION

No. C2-01-1132

FRED PARKER, *et al*,

Plaintiffs,

v.

THE STATE OF OHIO, OHIO APPORTIONMENT BOARD, *et al*,

Defendants.

May 23, 2003.

Before BOYCE F. MARTIN, Jr., *Chief Circuit Judge*, GRAHAM, and GWIN, *United States District Judges*.

BOYCE F. MARTIN, Jr., *Chief Circuit Judge*.

OPINION AND ORDER

Plaintiffs bring an action for declaratory and injunctive relief. They seek the invalidation of the 2001 apportionment plan for election of the Ohio General Assembly. They allege violations of Section 2 of the Voting Rights Act (as amended, at 42 U.S.C. § 1973) and of the Fourteenth and Fifteenth Amendments to the United States Constitution. These plaintiffs allege that minority voters, specifically African-Americans, were precluded from achieving political efficacy by the new apportionment plan.

The plaintiffs are voters residing in the challenged districts and are generally those persons protected under the Voting Rights Act. Defendants Taft, Blackwell, Petro, and Householder are elected officials of the State of Ohio and members

of the Ohio Apportionment Board, by virtue of their elected positions.[1] Plaintiffs claim that the Apportionment Board drafted an apportionment plan diluting the ability of Ohio's African-Americans to elect candidates of their choice. Specifically, the plaintiffs challenge House Districts 19, 20, 21, 25, 26, 27, 28, 29, 31, 32, 33, and 60. Plaintiffs also challenge Senate Districts 5 and 15.

Under the Ohio Constitution, decennially, after the federal census, Ohio is subdivided into ninety-nine state House of Representatives districts. According to the ratio of Ohio's population to those ninety-nine districts, the ideal legislative district size is 114,678. A variance of five percent, or 5,733, is permissible. As a result, districts vary from 120,411 to 108,945.

According to the 2000 census, Ohio is the seventh most populous state in the Union with 11,353,140 people. African-Americans comprise eleven and a half percent of the population, at 1,305,611 people. The African-American population of Ohio lives predominantly in the state's most urban counties, including those at issue in this litigation.

The legislative provisions governing the Apportionment Board are found in Article X of the Ohio Constitution. The Apportionment Board consists of the Governor (Taft), the Secretary of State (Blackwell), the Auditor of State (Petro), and two persons chosen by legislative leaders. In this instance, Ohio Speaker of the House Householder was chosen, as was State Senator Herington, who is a plaintiff in this case.

Following an initial meeting, at which the Board appointed Taft as Chairman and Scott P. Borgemenke as Secretary, the

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[1] For ease of identification, we will refer throughout this opinion to the plaintiffs as those who object to the reapportionment plan and to the defendants as those who created and support the reapportionment plan.

"Majority Members" of the Board directed Borgemenke to draft and submit a new apportionment plan on their behalf. The Majority Members (Taft, Blackwell, Petro and Householder) were those from the party holding a majority in the state houses, the Republican party. Borgemenke was directed to submit a plan that complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act. Defendants maintain that the Ohio Constitution was the predominant basis for Borgemenke's plan. He submitted the plan to the Board, as required by the rules, on September 24, 2001. The Ohio Republican Party, Plaintiffs Senator Leigh Herington and Ohio House Minority Leader Dean E. DePiero, and the NAACP also timely submitted plans for reapportionment.

The Board reconvened on both September 26 and October 1 to consider the plans and to hear testimony and other evidence on the respective plans. At the October 1 meeting, the Board adopted a series of technical changes to the Borgemenke plan, as well as a series of changes requested by Democratic members of the General Assembly. The Apportionment Board then adopted the Borgemenke plan as amended.

This suit arises out of that plan. Plaintiffs claim that the African-American vote, in Ohio as a whole and more specifically in Franklin, Hamilton, Mahoning, and Montgomery counties, has been diluted by the new apportionment plan.

In making the case against the defendants, plaintiffs must first show that they have standing to sue. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations, quotation marks, and footnote omitted), the Supreme Court held that the

> irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest

> which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

In *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995), the Supreme Court had an opportunity to revisit the standing issue in a way instructive to the question before us today. The Court said, "we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Id.* at 743, 115 S.Ct. 2431. The Court went on to say, "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *Id.*

Because of this rule, plaintiffs, in cases such as this one, who challenge a state's reapportionment plan on equal protection grounds claiming the plan has been racially gerrymandered, must show that they live in a district so affected. The *Hays* Court recognized that "Demonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another." *Id.* at 744, 115 S.Ct. 2431. If a plaintiff can argue that he resides in a district created in violation of his rights to equal protection and on the basis of race, then that plaintiff clearly has standing. *See id.* at 745, 115 S.Ct. 2431. The Court went on, however, to say, "On the other hand, where a plaintiff does not live in such a district, . . . any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific

evidence tending to support that inference . . . . [T]hat plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *Id.; see also Bush v. Vera,* 517 U.S. 952, 957-58, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996).

The defendants assert that some of the plaintiffs lack standing to sue, arguing that there is a problem with standing in House Districts 19, 21, 26, 32, and 33. The defendants argue that, respectively, plaintiffs Stearns, Parker, Beatty, Mallory, and Yates, do not actually challenge the constitutionality of the reapportionment plan as to their own districts. Because the purpose of this litigation is to resolve as fully as possible the question of the constitutionality of the 1991 Ohio reapportionment plan, for the purpose of this decision, we presume that all of the plaintiffs have standing to challenge the plan.

We turn now to the heart of the claim of vote dilution. The first of the plaintiffs' claims arises from the Voting Rights Act. In *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, (1986), the Supreme Court articulated three preconditions to a cognizable vote-dilution claim under Section 2 of the Voting Rights Act. The Sixth Circuit has described these preconditions as "a set of three necessary, but not sufficient, conditions for a plaintiff to succeed in a Voting Rights Act claim." *Mallory v. Ohio,* 173 F.3d 377, 380 (6th Cir.1999). *Gingles,* 478 U.S. at 50-51, 106 S.Ct. 2752 (internal citations omitted), states

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be

> able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

These preconditions have been used since *Gingles* to inform and drive the debate about racially-motivated redistricting. Although *Gingles* pertained to multi-member districts, the Supreme Court extended its reasoning and holding to single-member districts in *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) ("It would be peculiar to conclude that a vote- dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district.").

The defendants first argue that the plaintiffs have failed to carry their burden on the first *Gingles* precondition: showing that African-American populations in the districts at issue are sufficiently large and geographically compact to constitute a majority. As the defendants point out, the plaintiffs have failed to show in any challenged district that the district might be redrawn to constitute a majority/minority district, in a way consistent with Article XI of the Ohio Constitution.

The plaintiffs argue that the first *Gingles* precondition is not fully applicable here because they are merely seeking "influence districts" and the prevention of influence-dilution. An influence district is one where a distinct group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected. The plaintiffs cite to Footnote 2 of *Uno v. City of Holyoke*, 72 F.3d 973, 979 (1st Cir.1995) (parallel citations omitted), as support for their argument that the first *Gingles* precondition is inapplicable to influence claims:

> This precondition will have to be reconfigured to the extent that the courts eventually validate so-called influence dilution claims. *See Voinovich v. Quilter*, 507

> U.S. 146, 156-160, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (discussing treatment of claims brought on behalf of persons who constitute a potentially influential bloc, but less than the majority, within the relevant electorate, and raising prospect that the first *Gingles* precondition may have to be "modified or eliminated"). The lower courts are divided on the subject, *compare Armour v. Ohio*, 775 F.Supp. 1044, 1052 (N.D.Ohio 1991) (three-judge panel) (recognizing influence dilution claim) *with McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir.1988) (rejecting influence dilution claim), cert. denied, 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204, (1989), and the Supreme Court has declined on four occasions to decide whether such claims are cognizable under VRA § 2. *See* [*Johnson v.*] *De Grandy*, 512 U.S. [997, 1008-9, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)] . . . ; *Voinovich*, 507 U.S. at 156-160, 113 S.Ct. 1149 . . . ; *Growe v. Emison*, 507 U.S. 25, 41 n. 5, 113 S.Ct. 1075, 122 L.Ed.2d 388 . . . , *Gingles*, 478 U.S. at 46-47 n. 12, 106 S.Ct. 2752.

While plaintiffs are correct that the First Circuit and the Supreme Court have not yet ruled on influence districts, we are bound by precedent in this circuit. In *Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir.1998), the Sixth Circuit held, "[W]e do not feel that an 'influence' claim is permitted under the Voting Rights Act." *See also O'Lear v. Miller*, 222 F.Supp.2d 862 (E.D.Mich.2002). Because influence claims are not cognizable in our circuit and the plaintiffs have failed to establish the first *Gingles* precondition, we see no need to discuss whether or not plaintiffs satisfy the second and third preconditions. The plaintiffs' claim under Section 2 of the Voting Rights Act must fail.

We turn to plaintiffs' claims under the Fourteenth and Fifteenth Amendments. A Fourteenth Amendment claim is

distinct from a vote dilution claim, as the Supreme Court stated in *Miller v. Johnson*, 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal citations omitted):

> *Shaw* [*v. Reno*, 509 U.S. 630, 652, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)] recognized a claim 'analytically distinct' from a vote dilution claim. . . . Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,'an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts.

In order to assert a successful claim under the Fourteenth Amendment, plaintiffs must show that race was a predominant factor in drawing district lines in the reapportionment process. As Justice O'Connor stated in *Shaw*, "The Equal Protection Clause provides that '[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const., Amdt. 14, § 1. Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." 509 U.S. at 642, 113 S.Ct. 2816. For the plaintiffs to succeed, they must carry the burden of showing, "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. The Supreme Court clarified this showing, *id.* (citing *Shaw*):

> [A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by

> actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'

The defendants argue that the reapportionment plan was derived through race-neutral principles, those provided by the Ohio Constitution, specifically Article XI, which requires that political subdivisions generally may not be split. OH CONST. Art. XI, § 7. Defendant Borgemenke testified that the predominant basis for the decisions made in drafting the new apportionment plan was this article of the Ohio Constitution.

As the Supreme Court said in *Miller*, "Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." 515 U.S. at 915, 115 S.Ct. 2475 (internal citations omitted). The plaintiffs maintain they have made a sufficient showing of race-based decisionmaking with their evidence, but the burden to establish that race was the predominant factor at work in the redistricting is high. *See Easley v. Cromartie*, 532 U.S. 234, 240-1, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001).

The plaintiffs have presented no evidence as to the districts' shapes or contiguity, nor have they presented sufficient evidence of impermissible legislative purpose. The plaintiffs rest on two pieces of evidence. First, they claim that a phone conversation between the chief of staff to Defendant Speaker Householder and an unsuccessful Republican candidate for the State House demonstrates the predominance of race as a factor in the reapportionment plan. The chief of staff made a statement, unwittingly recorded, about having moved 13,000 African-Americans from House District 28 and having added 14,000 Republicans. The chief of staff was attempting to convince the unsuccessful Republican candidate to withdraw

from a primary contest against the Republican Caucus-endorsed candidate. Even though there were significant geographical changes in the configuration of District 28, there was no significant change in the African-American voting age population. Defendants argue that the chief of staff lied and that changes to the House Districts at issue are explained by their populations alone. The districts were unconstitutionally "light" or "heavy" in population, and municipalities were moved into new districts, consistent with the Ohio Constitution.

Second, the plaintiffs claim that the official reapportionment plan was never properly submitted to the NAACP for approval, instead being presented by a witness in the case, Johnson, who they claim had unfair and undisclosed biases in presenting the plan, because he was hired as a consultant to the Republican members of the Legislative Task Force.

These pieces of evidence are insufficient to show that the predominant factor in devising the redistricting plan was race. Because we must presume that the state acted in good faith until a sufficient showing is made otherwise, the plaintiffs' Fourteenth Amendment claim fails.

Finally, we turn to the plaintiffs' claim under the Fifteenth Amendment. The Supreme Court has stated, "This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment." *Voinovich*, 507 U.S. at 159, 113 S.Ct. 1149. To effectively make this claim, however, the plaintiffs need to show that the redistricting and reapportionment plan was intentionally discriminatory toward African- Americans. *See id.* As discussed in the context of the Fourteenth Amendment claim, the plaintiffs simply have not put forth sufficient evidence to establish that the State of Ohio, by its Apportionment Board, intentionally discriminated against

citizens of Ohio on the basis of race. The plaintiffs' Fifteenth Amendment claim must fail as well.

For the foregoing reasons, we find in favor of the defendants. All the judges agree as to this outcome, although they do so for different reasons. Those reasons are stated in their concurring opinions.

The Clerk is directed to enter judgment in favor of the defendants.

GRAHAM, *District Judge*, concurring.

I concur with Chief Judge Martin's opinion, with the exception of his treatment of the issue of standing as respects four of the house districts challenged by the plaintiffs. Defendants have moved for partial summary judgment on the ground that there are no plaintiffs who have standing to challenge the redistricting of House Districts 19, 21, 27 and 32. Defendants assert that those plaintiffs who reside in these districts have no objection to their configuration, and that the remaining plaintiffs, who are not residents of these districts, do not have standing to challenge their configuration.

The Supreme Court has held that nonresidents of allegedly racially gerrymandered districts have not suffered "a cognizable injury under the Fourteenth Amendment." *United States v. Hays*, 515 U.S. 737, 746, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). In *Shaw v. Hunt*, 517 U.S. 899, 904, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), the Supreme Court reaffirmed and summarized the rule of *Hays*, as follows:

> In *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995), we recognized that a plaintiff "who resides in a district which is the subject of a racial gerrymander claim has standing to challenge the legislation which created that district, but that a plaintiff

> from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification."

The same rules for standing should apply to plaintiffs' claims under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, which was enacted to enforce the guarantees of the Fourteenth and Fifteenth Amendments.[1] Nonresidents of House Districts 19, 21, 27 and 32 are not aggrieved persons with respect to the configuration of those districts. Their right to vote is not affected by the configuration of those districts. None of the nonresident plaintiffs has produced evidence that he or she has been subjected to a racial classification.

Plaintiffs bear the burden of proving their standing to challenge particular districts. *Hays*, 515 U.S. at 743-45, 115 S.Ct. 2431. Plaintiff Stern, who lives in House District 19, admitted in his deposition that he had no complaint about how his district was configured. Exhibit 46, Stern Depo. at 18. Plaintiff Parker was asked during his deposition to identify any house districts with which he disagreed in respect to their configuration. Parker said, "None specifically that I can name at this point." Parker Depo. at 36. At trial, Parker testified that although he objected to the new districts in Franklin County in general, he had not examined the configuration of House District 21, the district in which he resides, "to any great extent." Trial Tr. at 263. Plaintiff Beatty was asked during her deposition whether she had any objections to the configuration of her district, House District

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[1] For example, § 3 of the Act provides for the appointment of federal examiners when the Attorney General or "an aggrieved person" institutes a proceeding "under any statute to enforce the voting guarantees" of the Fourteenth and Fifteenth Amendments. 42 U.S.C. § 1973a.

27. She said, "I don't have any major objection. . . . I did prefer some of the areas that I had in my previous district that I no longer have." Exhibit 45, Beatty Depo. at 11-12. Beatty also testified that she consented to become a plaintiff in this case because "it allows for some diversity of representatives across the state." Beatty Depo. at 16. Plaintiff Mallory testified in his deposition that he had no objections to House District 32, the district in which he resides. Mallory Depo. at 30. At trial, Mallory testified that House District 32 was "fine," but that some African-American voters residing there should be transferred to an adjacent district, and that his objections were to the configuration of the adjacent district. Trial Tr. at 32, 326.

No other plaintiffs are residents of House Districts 19, 21, 27 and 32. None of the nonresident plaintiffs have standing to challenge the configuration of those districts. I would grant defendants' motion for summary judgment on the issue of standing with respect to House Districts 19, 21, 27 and 32.

I concur with Judge Gwin's finding that plaintiffs have failed to demonstrate that the white majority votes sufficiently as a block to enable it to defeat the minority's preferred candidate, and I agree with his analysis of the evidence on that issue.

However, I disagree with Judge Gwin's suggestion that influence claims are permitted under § 2 of the Voting Rights Act. This issue was squarely addressed by the Sixth Circuit Court of Appeals in *Cousin v. Sundquist,* 145 F.3d 818, 828-29 (6th Cir.1998) ("We believe the district court erred in assuming from the *Gingles* footnote and the Senate Report that an influence claim is actionable under Section 2.") Since the court in *Sundquist* rejected one of plaintiffs' claims as an impermissible influence claim, and also rejected plaintiffs' proposed two-district system on that basis, it is inaccurate to characterize the court's ruling as "dicta." I also believe that *Sundquist* is binding authority for three-judge district courts

sitting within the Sixth Circuit. As Judge Gwin has pointed out, a majority of three-judge district courts and circuit courts of appeals hold that circuit court precedent is binding on a three-judge district court.

Even if we were not bound by *Sundquist*, I would find that influence claims are not authorized under § 2 of the Voting Rights Act for the same reasons that the court in *Sundquist* and other courts and judges have rejected influence claims. *See Sundquist*, 145 F.3d at 828-29; *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944, 947-48 (7th Cir.1988) ("Movement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations."); *Hastert v. State Bd. of Elections*, 777 F.Supp. 634, 654 (N.D.Ill.1991) ("We perceive the *Gingles* electoral district majority precondition as the only rational measure for limiting voter group size under the Voting Rights Act."); *Armour v. State of Ohio*, 775 F.Supp. 1044, 1082 (N.D.Ohio 1991) (Batchelder, J., dissenting) ("Such a limitless and standardless cause of action is too ambiguous and unenforceable to be valid."). *See also DeBaca v. County of San Diego*, 794 F.Supp. 990, 996-97 (S.D.Cal.1992) (rejecting *Armour* and following *Hastert*).

If influence claims are permitted, then any system of districting, no matter how fair and impartial in its conception, is subject to attack unless it pools minority voters in sufficiently large enclaves so that they can "influence" the result of elections. This would transfer the principle of "one man—one vote" into "one group—one election victory."[2]

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[2] *See Armour v. State of Ohio*, No. 88-4040, 1990 WL 8710 at * 10 (6th Cir. Feb.7, 1990) (Guy, J., dissenting) (opinion withdrawn).

GWIN, *District Judge*.

While I concur with the decision to give judgment to the defendants, I do so for different reasons. The majority relies upon an interpretation of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) that requires minorities to constitute a majority of the voting population before bringing a claim under Section 2 of the Voting Rights Act ("the Act"), 42 U.S.C. § 1973(a). I believe such a holding is both unnecessary to the case before us and also likely wrong. Instead, I believe the plaintiffs' claims fail because they do not show that the White majority votes sufficiently as a block to enable it to usually defeat the minority-preferred candidate.

Section 2 of the Act addresses electoral procedures that cause minority voters to have "less opportunity than other members of the electorate to participate in the political process." 42 U.S.C. § 1973(b). Section 2 prohibits a state from creating districts that dilute the ability of minority group members to elect representatives of their choice. *Gingles*, 478 U.S. at 46-47, 106 S.Ct. 2752. To prevail on a Section 2 claim, the party challenging the redistricting plan must prove that the application of the plan will operate, or has operated, to reduce or cancel the ability of minority voters to elect their preferred candidates. *Id.* at 48, 106 S.Ct. 2752.

In 1982, Congress significantly broadened the ability to seek redress under the Act. The 1982 amendments to Section 2 of the Act responded to the Supreme Court's decision, *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), a decision that required plaintiffs to show discriminatory intent to prove a vote-dilution claim on either constitutional or statutory grounds. In response to this narrow reading by the Court, Congress amended Section 2 of the Act to overrule the restrictive "intent" test established in *Bolden*.

Congress instead adopted a "results" test.[1] In addition, Congress directed courts to consider nine explicit factors when determining the validity of a Section 2 claim. In setting out factors for Courts to consider, Congress set no requirement as to the percentage of voters minority populations must have before they could challenge an election practice. Instead Congress directed courts to consider "the totality of circumstances."

An act or procedure violates the Act if it causes a minority group to have "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C. § 1973, *accord* Beth A. Levene, *Influence-Dilution Claims Under the Voting Rights Act,* 1995 U. Chi. Legal F. 457, 466. The legislative history of the Act shows that Congress sought to ensure minority groups' ability to meaningfully participate in

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[1] As amended, 42 USC § 1973(a)-(b) (1988) reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

elections, not just elect candidates of their choice. *See* S.Rep. No. 97-417, at 29 n. 115 (1982). The Senate Report notes, "the issue to be decided under the results test is whether the political processes are equally open to minority voters." *Id.* at 2. As one commentator notes, influence claims are consistent with the purposes of the Act because "'political effectiveness' not only includes the power to elect, but also . . . the ability to use a group's voting strength to persuade candidates to address particular issues." Levene, *supra* at 468.

In *Gingles,* the Supreme Court reviewed North Carolina's at-large state election scheme. Despite a lack of indication that Congress intended to limit Section 2 claims, the Court identified certain conditions that a plaintiff must establish before proceeding to the more general factors Congress set out in 42 U.S.C. § 1973(b). As to challenges to at-large districts, the *Gingles* Court required the challenger show that it: 1) is sufficiently large and geographically compact to make up a majority in a single-member district, 2) that the minority group is politically cohesive, and 3) that White voters have discriminatorily blocked the minority population from electing their preferred candidate. *Gingles,* 478 U.S. at 50-51, 106 S.Ct. 2752.

While requiring that challengers to at-large districts show a majority in a single member district, the Court disclaimed an intent to deal with single-member district challenges:

> We have no occasion to consider . . . what standards should pertain to ( ) a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

Id. at 46-47 n. 12, 106 S.Ct. 2752.

After *Gingles,* the Court has explicitly avoided deciding whether a plaintiff can bring a claim absent a showing that

the minority makes up most of the voters in a single-member district. In *Growe v. Emison*, 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), the Court used the *Gingles* factors in deciding a challenge to a single-member district but the Court expressly declined to decide whether plaintiffs could make influence dilution claims absent a minority-majority population. *Id.* at 41 n. 5, 106 S.Ct. 2752.

The Court's decision in *Voinovich v. Quilter*, 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993), is even more relevant to whether a plaintiff can make an influence claim where the minority population makes up less than a majority of the voting age population. In *Voinovich*, the minority plaintiffs argued that their Section 2 rights were violated when the reapportioning body failed to construct influence districts, districts where minorities make up less than a majority of the voting age population but where they could join with others to elect preferred candidates.[2] Despite facing the issue of whether plaintiffs from districts with less than a minority-majority population could make claims, the Supreme Court again declined to reach the issue. Explaining its treatment of the *Gingles* multimember district requirement

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[2] The Court described the claim:

> Appellees in this case, however, do not allege that Ohio's creation of majority-black districts prevented black voters from constituting a majority in additional districts. Instead, they claim that Ohio's plan deprived them of "influence districts" in which they would have constituted an influential minority. Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters.

507 U.S. at 154, 113 S.Ct. 1149.

that the minority population be sufficient to constitute a majority in a district, the Court held:

> Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo,* to be actionable today. *Id.* at 1155. The complaint in such a case is not that black voters have been deprived of the ability to constitute a majority, but of the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority. *See ibid.* We need not decide how *Gingles'* first factor might apply here, however, because appellees have failed to demonstrate *Gingles'* third precondition-sufficient white majority block voting to frustrate the election of the minority group's candidate of choice. *Id.* at 158, 113 S.Ct. 1149.

The *Voinovich* Court ruled against the appellees because they had failed to show that Whites voted as a block. If the *Voinovich* Court had intended to stop influence claims in districts where minorities do not make up a majority, it could have made that finding on a legal basis. Instead it engaged in a factual review that required it to decide whether, under a clear error analysis, sufficient evidence supported the district court's finding that White voters did not vote as a block.

In *Johnson v. De Grandy,* 512 U.S. 997, 1009, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), the Court again declined to find that plaintiffs could not make influence claims. ("As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases.")

> Beyond its repeated failure to impose the minority-majority condition upon Section 2 claims challenging a single-member district, the Court has emphasized that courts should not quickly apply judicially crafted limitations to Section 2 litigation. In *Chisom v. Roemer*, 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991), the Court stated a philosophy of affording a hearing to claims without judicially created limitations: [T]he standard that should be applied in litigation under Section 2 is not at issue here. Even if serious problems lie ahead in applying the totality of the circumstances described in Section 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

501 U.S. at 416, 111 S.Ct. 2354.

The majority finds that plaintiffs fail to meet the first prong of the *Gingles* test. The plaintiffs argue that the first prong of the *Gingles* test does not apply because their claims are "influence claims." The plaintiffs point to First Circuit authority that supports this argument. *See Uno v. City of Holyoke*, 72 F.3d 973, 979 (1st Cir.1995). *See also Armour v. Ohio* 775 F.Supp. 1044, 1052 (N.D.Ohio 1991) (three judge panel) (recognizing validity of influence claim). Also, as described above, the Supreme Court has gone out of its way to avoid applying the first prong of *Gingles* to stop influence claims.

Lacking any clear Supreme Court holding requiring minority-majority status before a Section 2 claim can be made in a single-member district, the majority relies upon *Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir.1998). In *Sundquist*, the Sixth Circuit reviewed a Section 2 challenge to Tennessee's at-large method for electing judges. The *Sundquist* Court explicitly did not reach a determination whether the plaintiffs needed to show a sufficiently large and

geographically compact concentration to constitute a majority in a district:

> Since we conclude that the plaintiffs failed to meet the third pre-condition, we need not conduct a detailed inquiry into the first factor, the geographic compactness of blacks in Hamilton County...

145 F.3d at 823. The *Sundquist* Court then relied upon its finding that there was insufficient evidence showing that Whites voted as a block to defeat minority favored candidates. In declining to rest its decision on the failure to show minorities made up a majority in the challenged district, the *Sundquist* Court relied upon the Supreme Court's failure to reach this issue in *Voinovich*. 145 F.3d at 823 (citing *Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993)). *See also, Gingles*, 478 U.S. at 50, 106 S.Ct. 2752.

As with *Voinovich*, the *Sundquist* Court then reviewed the trial court's finding that Whites voted as a block to defeat minority preferred candidates for clear error. 145 F.3d at 823. The *Sundquist* Court's discussion of the first *Gingles* condition is obvious dicta. If the Sixth Circuit intended to stop influence claims for districts where minorities did not make up a majority of voters, why would it undertake the detailed factual analysis necessary to reverse the district court's finding that the White majority voted as a block? Stated otherwise, why make the effort if the Sixth Circuit intended to stop influence claims because the minority complainants could not show they made up a majority in the voting district?[3]

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[3] Some question exists whether the Sixth Circuit's opinion in *Sundquist* would control us in any regard. Does the Sixth Circuit's opinion constitute *stare decisis* on a statutory three-judge district court? Congress directs that voting rights claims be heard by a statutory three-judge district

The majority also relies upon *O'Lear v. Miller*, as authority against the viability of influence claims. However, *O'Lear* does not bind this Court. The *O'Lear* court, like the majority here, misread *Sundquist* as binding authority. *O'Lear v. Miller*, 222 F.Supp.2d 850, 860-61(E.D.Mich.2002). Second, even if *O'Lear* did not base its holding on dicta, *O'Lear* would not control this Court, as another statutory three district judge court rendered the decision. The decisions of statutory three-judge district courts do not bind other statutory three-judge district courts. *See, San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1316 (9th Cir.1981); *see also, Lewis v. Rockefeller*, 431 F.2d 368, 371 (2d Cir.1970) ("A district court . . .convened as a statutory three-judge panel . . . still is sitting as a district court for purposes of *stare*

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court, *see* 28 U.S.C. § 2284, with appeal directly to the Supreme Court, thereby bi-passing the Circuit Court of Appeals. *See id.* The doctrine of *stare decisis* in practice, commands that lower courts follow the precedent of courts who review their decisions. If our decision is reviewable only by the Supreme Court, logic suggests that we are not bound by circuit authority. While such authority may persuade, only Supreme Court holdings would seem to have controlling authority.

At least one statutory three-judge district court agrees. *See Jehovah's Witnesses in Washington v. King County Hosp.*, 278 F.Supp. 488, 502-3 (W.D. Wash. 1967)("In this special three-judge court case we are not bound by any judicial decisions other than those of the United States Supreme Court."). In contrast, a majority of three-judge district courts and circuit courts disagree. *See Baksalary v. Smith*, 579 F.Supp. 218, 227 (E.D.Penn. Feb. 1, 1984); *Finch v. Mississippi State Medical Ass'n., Inc.*, 585 F.2d 765, 773 (5th Cir.1978); *Lewis v. Rockefeller*, 431 F.2d 368, 371 (2d Cir.1970); *Russell v. Hathaway*, 423 F.Supp. 833, 835 (N.D.Tex.Dec.10, 1976); *Hopson v. Schilling*, 418 F.Supp. 1223, 1234-35 n. 15 (N.D.Ind. July 15, 1976); *Athanson v. Grasso*, 411 F.Supp. 1153, 1157 (D.Conn.1976), *Alabama NAACP State Conference of Branches v. Wallace*, 269 F.Supp. 346, 350 (M.D.Ala. May 3, 1967). However, these three judge district courts follow circuit precedent without clear explanation of why such precedent should control courts who are not reviewed by those circuits.

decisis"); *see also*, P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's *The Federal Courts and the Federal System*, 967-79 (2d ed.1973) ("purpose of a three-judge court ...was not to add a greater than normal authority or finality to its decision"). For these reasons *O'Lear* does not control our decision. To the extent it is offered as persuasive authority, it fails to offer a reasoned explanation why claims under Section 2 should be limited to districts where minorities make up a majority of voters.

If required to decide, by the facts presented herein, I would find strong support for allowing influence claims. Most important, nothing suggests that Congress intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters. The Supreme Court has also suggested that a minority influence claim may be sufficient to sustain a Section 2 results claim. In *Chisom v. Roemer*, 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991), the Court stated that to establish a Section 2 claim, the plaintiffs must show both that they have less opportunity to participate in the political process and that they have less opportunity to elect representatives of their choice. Justice Scalia dissented, arguing that this reading of Section 2 would leave "minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis 'elect representatives of their choice' " entirely without Section 2 protection. *Id.* at 409, 111 S.Ct. 2354. He further reasoned that such minorities could therefore be denied equal opportunity to participate in the political process with impunity. *Id.* The majority responded to Justice Scalia's dissent by pointing out that his argument "rested on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Id.* at 397 n. 24, 111 S.Ct. 2354. Thus, the Court suggested that influence claims can be valid under Section 2 of the Act.

The majority gives judgment to the defendants after finding African- American voters are not able to show that they could constitute a majority in any proposed district. As explained above, I am not convinced that plaintiffs are required to make such a showing. Yet more important for our present circumstances, we need not reach this issue because the plaintiffs have failed "to demonstrate that the White majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. at 50, 106 S.Ct. 2752.

In support of their argument that White majority voters do not vote as a block to defeat the minority's preferred candidate, the defendants first point to Ohio election returns in recent years. During the period 1992—2000, African-American candidates won seventy-four of eighty-four races. Of the races lost, one involved an African-American running as an independent and most of the other results involved an African-American Democrat running in a Republican leaning district.

In Ohio, African-Americans make up 11.46% of the population. Although having less than 12% of the population, African-Americans held 14% of the Ohio House seats and 12% of the Ohio Senate seats after the 2000 election. African-Americans candidates won these seats with signifycant White crossover votes. Since 1991, African-Americans have held four Senate seats, only one of which has a minority-majority African-American voting age population. African- American candidates won three Ohio Senate Seats with African-American voting age population of 27.21%, 39.04%, and 32.28% respectively. African-Americans won these seats with significant White crossover votes.

In the 2000 election, fourteen African-American candidates won election to the Ohio House, usually with significant White support. Of the fourteen African-Americans elected in 2000, only four were from minority-majority African-

American districts. Five of these candidates won election to the Ohio House from districts with less than 40% African-American voting age population. After correcting for methodology errors, the defendants' expert, Dr. King,[4] found that the candidate of choice of the African American community won in twenty-seven of thirty-four races. While such success alone does not establish that Whites do not vote as a block, it is certainly relevant.[5] [FN5] *Gingles,* 478 U.S. at 99, 106 S.Ct. 2752 ("[T]he relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution").

The defendants provided persuasive statistical evidence showing that Ohio has little racially polarized voting in relevant elections, which is important to our consideration whether the plaintiffs established that Whites vote as a block, thereby denying minorities opportunity to meaningfully participate.

Dr. King gave persuasive testimony suggesting that Ohio has little significant racially polarized voting in Ohio General

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[4] Dr. King, a Professor of Government at Harvard University and Director of the Harvard Data Center, is trained in both political science and statistics. King specializes in statistical analysis of social issues including the quantitative review of voting trends to decide whether racially polarized voting is present. He has published extensively and is credited with developing methods and application of quantitative methods to redistricting.

[5] Professor King developed a regression analysis improving on the long-utilized "Goodman's Regression." Goodman's regression often gives incorrect results. Dr. King's analysis starts with Goodman's regression and improves it by correcting for information known to be true. Dr. King's analysis has received high praise and peer acceptance and use.

Assembly elections.[6] After correcting for errors, Dr. King reviewed Ohio elections over the 1990—2000 time frame. He first sought to set up a control group. To control for differing party loyalties between African-Americans and Whites, King compared elections where an African-American Democrat candidate faced a White Republican candidate. He then contrasted the results of these elections with races where a White Democrat faced a White Republican. King then compared the degree of different voting between African-Americans and Whites to see what influence the race of the candidate had in the vote. King described the results after reviewing 123 elections from across Ohio:

> So what we can look at here is the degree of racially polarized voting overall, but then given different treatments, that is given different sets of candidates, so let's start with a white Democrat versus a white Republican. When a white Democrat runs against a white Republican, the degree of racially polarized voting is about 31.7 percent. Very interest-ingly, when the Democrats decide instead to nominate an African-American, that number stays almost exactly the same. The number beneath it is 31.8 percent. That's fairly remarkable. In fact it's quite remarkable, and it's a tribute to the people of Ohio, essentially, that a different type of candidate is nominated and people are responding in very similar ways.

In fact you can look at the individual black and white behavior to dissect this a little further. What happens when a white Democrat runs against a white Republican among black

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[6] Racially polarized voting or racial block voting is the difference between the percent of Blacks voting for a candidate and the percent of Whites voting for that candidate.

voters? About 79 percent of them give their support to the Democratic candidate. What happens when the Democrats decide to run blacks? More blacks vote for the black Democrat. It goes from 79.4 to 84.4. That's very interesting, but it's not surprising. But what is very interesting is that whites are doing the same thing. Whites give 47.7 percent to the white Democrats when it's a white Democrat running, and their support for the Democratic candidate also increases when the Democrats run a black; it increases to 52.6 percent. The result overall is that the degree of racially polarized voting, the difference between the first and second column, doesn't really change.

Section 2 applies when Whites and racial minorities consistently prefer different candidates at the polls. Section 2 prohibits a state from drawing district lines that take advantage of these differing preferences to give White preferred candidates a majority in a disproportionate share of districts and prevent minority voters from electing candidates of their choice. Plaintiffs must show that the local majority votes as a block. Evidence regarding the success of the minority's preferred candidates speaks to whether such majority block voting occurs. *See Gingles*, 478 U.S. at 51, 106 S.Ct. 2752 ("It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'")

Here, the persuasive evidence before the Court shows that Ohio's majority White voters do not vote in a block. Having failed to show significant differences in the preferences of White and minority voters, the plaintiffs do not establish the core consideration necessary to succeed with their Section 2 claimthat the defendants used a significant racial voting disparity to apportion districts to defeat minority participation. Failing such a showing, we must give judgment to the defendants.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed Jul 17, 2003]

No. C2-01-1132

FRED PARKER, *et al*,

Plaintiffs,

v.

THE STATE OF OHIO,
OHIO APPORTIONMENT BOARD, *et al*,

Defendants.

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that all Plaintiffs by and through counsel, appeal to the Supreme Court of the United States pursuant to 28 U.S.C.S. § 1253 (2003) from the Judgment and Order granting Defendants judgment entered in this action on May 23, 2003.

Respectfully submitted,

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APPENDIX C

Article 11 of the Ohio Constitution—Apportionment

§ 01 Persons responsible for apportionment of state for members of General Assembly

The governor, auditor of state, secretary of state, one person chosen by the speaker of the House of Representatives and the leader in the Senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representative districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law.

§ 02 Method of apportionment of state for members of General Assembly

The apportionment of this state for members of the General Assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years

next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

§ 03 Population of each House of Representatives district

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.

§ 04 Population of each Senate district

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.

§ 05 Representation

Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly.

§ 06 Creation of district boundaries; change at end of decennical period

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and

the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed.

§ 07 Boundary lines of House and Representatives districts

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

§ 08 Determination of number of House of Representatives districts within each county

A county having at least one House of Representatives ratio of representation shall have as many House of Representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining House of Representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the House of Representatives determined under section 2 of this Article.

§ 09 When population of county is fraction of ratio of representation

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the House of Representatives, reasonable effort shall be made to create a House of Representatives district consisting of the whole county.

§ 10 Creation and numbering of House of Representatives districts

The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of House of Representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the House of Representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts.

§ 11 Senate districts

Senate districts shall be composed of three contiguous House of Representatives districts. A county having at least one whole Senate ratio of representation shall have as many Senate districts wholly within the boundaries of the county as it has whole Senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining Senate district. Counties having less than one senate ratio of representation, but at least one House of Representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article.

§ 12 Change in boundaries of Senate districts

At any time the boundaries of Senate districts are changed in any plan of apportionment made pursuant to any provision of

this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.

§ 13 Jurisdiction of Supreme Court, effect of determination of unconstitutionality; apportionment

The Supreme Court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any section of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the Supreme Court of Ohio, or the Supreme Court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the General Assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow

thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

§ 14 District boundaries until January 1, 1973

The boundaries of House of Representatives districts and Senate districts from which representatives and senators were elected to the 107th General Assembly shall be the boundaries of House of Representatives and Senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

§ 15 Severability provision

The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

APPENDIX D

§ 2 of the Voting Rights Act of 1965, as amended,
42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

APPENDIX E

14th Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

15th AMENDMENT TO THE UNITED STATES CONSTITUTION

UNIVERSAL MALE SUFFERAGE

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Supreme Court, U.S.
FILED
OCT 17 2003
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No. 03-411

IN THE

Supreme Court of the United States

FRED PARKER, *et al.*,
Appellants,

v.

STATE OF OHIO, *et al.*,
Appellants.

Appeal from the United States District Court for the Southern District of Ohio

MOTION TO AFFIRM

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QUESTIONS PRESENTED

In this case, a unanimous three-judge federal District Court held that the 2001 reapportionment of the Ohio General Assembly did not violate §2 of the Voting Rights Act, 42 U.S.C. §1973, or the Fourteenth or Fifteenth Amendments to the United States Constitution. The questions presented on this appeal are:

1. Did the District Court properly rule that Plaintiffs-Appellants had not satisfied their burden of establishing a *prima facie* case of vote dilution in violation of §2 of the Voting Rights Act by failing to prove the first and third *Gingles* preconditions?

2. Did the District Court properly rule that Plaintiffs-Appellants' Fourteenth Amendment claim failed because their evidence was insufficient to prove that race was the predominant factor motivating the drawing of district lines?

3. Did the District Court properly rule that Plaintiffs-Appellants failed to introduce sufficient evidence of intentional racial discrimination to support their claim under the Fifteenth Amendment?

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The decision of the court below presents no issue worthy of plenary review. Accordingly, Appellees respectfully request this Court to summarily affirm the judgment of the District Court.

STATEMENT OF THE CASE

A. The Apportionment Process in Ohio

Pursuant to Article XI, §1 of the Ohio Constitution, the Ohio Apportionment Board convenes every ten years in the year following the decennial census. Ohio Const., Art. XI, §1.[1] The 2001 Apportionment Board, consisting of Defendants-Appellees, Governor Robert A. Taft, Jr. ("Taft"), Secretary of State J. Kenneth Blackwell ("Blackwell"), then Auditor of State Jim Petro ("Petro"), and Ohio House of Representatives Speaker Larry Householder ("Householder"), as well as Plaintiff-Appellant and then Ohio Senator Leigh Herington, ("Herington"), convened on August 2, 2001. At the initial meeting, the Board elected Taft as its Chairman, and appointed Defendant-Appellee Scott P. Borgemenke ("Borgemenke"), as its Secretary.

Following the initial meeting, Taft, Blackwell, Petro, and Householder ("Majority Members") directed Borgemenke to draft and submit a plan of apportionment on their behalf. Borgemenke was directed to submit a plan that complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act, 42 U.S.C. §1973, *et seq.* As the testimony and evidence adduced before the District Court herein amply demonstrated, the Ohio Constitution was the predominant

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[1] The Ohio Constitution does not actually create an "Apportionment Board," but rather provides that the Governor, Secretary of State, Auditor of State, and two persons chosen by the legislative leaders of both political parties "shall be the persons responsible for the apportionment of this state for members of the general assembly." Ohio Const., Art. XI, §1. For ease of reference, the apportioning persons will hereinafter be referred to as the "Apportionment Board" or the "Board."

basis for the plan Borgemenke drew and which was ultimately adopted by the Apportionment Board.[2]

B. The Participation of Floyd Johnson

Floyd Johnson ("Johnson"), who first became involved with Ohio's reapportionment as a voting rights activist in 1965, was appointed as "redistricting and reapportionment coordinator" for the Ohio Conference of Branches of the NAACP in 1990. He was reappointed to that same position with regard to the 2001 reapportionment.

Following his appointment, Johnson sought funding for his work from the Legislative Task Force on Redistricting, Reapportionment and Demographic Research ("Task Force"). R.C. 103.51.[3] Johnson's work (office space, computer equipment, software, etc.) had been similarly funded by the Task Force during the 1991 reapportionment process without objection. Although Johnson attempted to obtain funding di-

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[2] The various Ohio Constitutional provisions that govern the apportionment process are set forth in the Appendix to Appellants' Jurisdictional Statement beginning at page 29a. *Appellants did not allege, and do not now contend, that the plan adopted by the Apportionment Board violates the Ohio Constitution in any way.*

[3] Contrary to Appellants' assertion, the Task Force is not the creation of "the House Republican Caucus." Jurisdictional Statement at 3. Rather, it is a bipartisan state agency created in 1991 by an act of the General Assembly and authorized to engage consultants in demographic research and to assist the Apportionment Board in preparing a plan of apportionment. R.C. 103.51. The Democratic and Republican members of the Task Force were *each* appropriated $150,000 to engage such consultants in the preparation of their competing proposed apportionment plans. The Democratic members engaged Robert Dykes ("Dykes"), who drafted their plan, and paid legal counsel, while the Republican members engaged Johnson and Borgemenke. Despite Appellants' professed "surprise" that the Republicans or their consultants did not "disclose" their engagement, it is clear that the Democrats made no such disclosures. Moreover, such information is (and was) easily discoverable as a public record. Indeed, Plaintiff-Appellant and then State Representative (now Senator) Ray Miller ("Miller"), was a Democratic member of the Task Force.

rectly from the NAACP, he sought funding from the Task Force as a "shortcut," given the impending deadline for the submission of plans and the "slow" funding from the NAACP.

Moreover, although Johnson's contract was with the Republican members of the Task Force, *i.e.*, he was being paid out of the appropriation set aside for the Republican members of the Task Force, his services were available to both Republicans and Democrats. Johnson attempted to consult with Democratic incumbents, including then Representative Miller, a Democratic member of the Task Force, who refused such cooperation.

C. The Adoption of the Plan

Pursuant to the Board's rules, Borgemenke submitted the Majority Members' plan to the Board on September 24, 2001. Three other plans were also timely submitted for the Board's consideration prior to the September 24 deadline: (1) a plan submitted by the Ohio Republican Party, (2) a plan drafted by Democratic consultant Dykes and submitted by Herington and Plaintiff-Appellant Ohio House Minority Leader Dean E. DePiero ("DePiero"), and (3) a plan submitted by Johnson on behalf of the NAACP, Ohio Conference of Branches.[4] The

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[4] Johnson testified at the public hearings conducted by the Apportionment Board at ten locations throughout the state. At the September 26, 2001, Board meeting, Johnson stated that the Majority Members' plan met the goals and objectives of the NAACP. Contrary to Appellants' assertion, see Jurisdictional Statement at 6-7, *the plan Johnson submitted on behalf of the NAACP was subsequently approved by the Ohio Conference of Branches.* On October 13, 2001, Johnson presented his plan, which, because of his consultation with Borgemenke, was similar to the plan adopted by the Apportionment Board, to the Ohio Conference of Branches of the NAACP annual convention. He supplied every delegate with a copy of his plan, and presented the substance to them. Following the presentation, the convention voted 98-0 to endorse Johnson's plan. The fact of Johnson's contract with the Republican members of the Task Force had been the subject of a Democratic press release on September 27, 2001, and had been in "all the papers" prior to the Ohio Conference's approval of the plan submitted by Johnson on its behalf.

Board reconvened on September 26 and October 1, 2001, to consider the various plans and to receive any testimony or evidence concerning the proposed plans.

At its October 1, 2001, meeting, the Board adopted a series of technical corrections to the Majority Members' plan, and a series of changes requested by Herington, DePiero, and other Democratic members of the General Assembly. The Apportionment Board then proceeded to adopt the Majority Members' plan, as amended. The Board reconvened on October 4, 2001, to adopt another series of technical corrections. The plan, as amended, was then published as required by Article XI, §1 of the Ohio Constitution and R.C. 107.09.

In contrast to the plan adopted by the Apportionment Board, the alternative plan advanced by the Appellants—the so-called "Herington/DePiero Plan"—was not based predominantly on the provisions of Article XI of the Ohio Constitution. Indeed, as Dykes, the plan's drafter, made clear in both his testimony to the Apportionment Board and his testimony to the District Court, on numerous occasions he elevated racial considerations over and above the requirements of the Ohio Constitution, and in particular, the Constitution's prohibition against splitting more than one political subdivision between districts.

D. Course of Proceedings Below

Appellants originally commenced this case as a class action in the United States District Court for the Northern District of Ohio on October 26, 2001, but dismissed the case and refiled in the Southern District of Ohio, also as a class action. In their complaint, Appellants set forth claims under §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Appellants eventually decided not to pursue class certification, and instead filed an Amended Complaint adding a number of individual plaintiffs so that at least one plaintiff resided in each of the twenty-one (21) districts then

being challenged. The Plaintiffs-Appellants were all registered Democrats, and most are current or former members of the Ohio General Assembly, or candidates therefor. With the exception of Herington and DePiero, all Plaintiffs-Appellants are African-American.

Just prior to trial, the Appellants filed a Second Amended Complaint reducing the number of districts they were challenging to twelve (12) house districts ("HD") and two (2) senate districts ("SD") located primarily in four counties: Franklin (Columbus), Hamilton (Cincinnati), Mahoning (Youngstown), and Montgomery (Dayton). As noted by Judge Graham in his concurring opinion below, however, not all of the individual Plaintiffs actually challenged the districts in which they reside.[5]

The case was tried to the Court on September 30 through October 2, 2002.[6] On May 23, 2003, the District Court issued its unanimous decision rejecting all of Appellants' claims, although each member of the three-judge court submitted a separate opinion setting forth differing reasons for the

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[5] At least four of the Appellants testified either in deposition or at trial (or both) that they had no particular problem with the configuration of the districts in which they resided: Plaintiff-Appellant Stearns in HD19, Plaintiff-Appellant Parker in HD21, Plaintiff-Appellant Beatty in HD27, and Plaintiff-Appellant Mallory in HD32. The District Court majority declined to address the standing issue, see *Parker v. Ohio*, 263 F.Supp.2d 1100, 1103-04, App. at 5a (S.D.Ohio 2003), but Appellees maintain that Judge Graham was correct in his conclusion that these four Plaintiffs lacked standing, and that the District Court should have dismissed the challenges to their districts.

[6] Contrary to Appellants' assertion, the Court did not require "that direct and cross-examination testimony of all non-party lay witnesses be presented in advance of trial through transcripts of depositions." Jurisdictional Statement at 10. Rather, the Court allotted an equal amount of time over the two days of trial to each side to present its case, and, faced with these time limitations, Appellants were permitted to present some of their witnesses through the introduction of deposition transcripts, which were admitted as Joint Exhibits.

decision. *Parker v. Ohio*, 263 F.Supp.2d 1100, App. at 1a (S.D. Ohio 2003).

E. The Challenged Districts as Contained in the 2001 Plan of Apportionment

Notwithstanding Appellants' §2 challenge, the evidence submitted below demonstrates that the percentages of African-American voting age population in the challenged districts contained in the adopted plan and the corresponding districts in the Herington/DePiero Plan were substantially similar. As the information in the table below—extrapolated from the parties' Joint Exhibit 24—demonstrates, the differences in African-American voting age population, in most instances, are insignificant.

2001 Adopted Apportionment Plan			**2001 Democrat (Herington/DePiero) Plan**		
Dist. #	% Afr.-Am. Pop.	% Afr.-Am. Voting Age Pop.	Dist. #	% Afr.-Am. Pop.	% Afr.-Am. Voting Age Pop.
Franklin County					
HD26	51.40	46.94	HD21	45.60	41.60
HD27	47.14	40.95	HD20	43.39	39.85
HD21	14.81	13.72	HD22	42.37	37.89
HD20	13.63	12.56	HD26	9.30	8.66
HD25	10.14	8.93	HD27	9.29	8.28
HD19	9.53	8.13	HD28	7.62	6.81
SD15	36.28	32.24	SD15	43.82	39.81
Hamilton County					
HD33	49.79	47.25	HD30	59.41	54.80
HD32	49.01	42.41	HD31	55.32	48.95
HD31	27.32	22.51	HD32	44.23	39.99
HD28	22.50	20.50	HD36	7.24	5.97
HD29	16.40	14.65	HD33	5.47	5.03

Mahoning County					
HD60	33.58	29.85	HD62	34.50	30.80
Montgomery County					
SD5	29.64	27.38	SD5	29.81	27.09

Moreover, even a cursory county-by-county examination of the districts challenged by Appellants demonstrates that such challenges are baseless.

Franklin County House Districts. With regard to Franklin County, Appellants assert that the Board should have created three "influence districts" of above 40% African-American population. Jurisdictional Statement at 8-9.[7] As the testimony below establishes, however, to do so would have required the Board to commit numerous violations of the Ohio Constitution's prohibition against splitting more than one political subdivision between districts. Moreover, to have unnecessarily elevated racial considerations over the race-neutral provisions of the Ohio Constitution would have ignored the considerable success of African-American candidates and other candidates preferred by African-American voters in Franklin County. Indeed, Appellants' expert witness, Dr. Lisa Handley ("Handley"), whose report and testimony is discussed in greater detail below, concluded that African-Americans' preferred candidate won six of the seven Franklin County election contests she analyzed.

Franklin County Senate District. With respect to SD15, Appellants assert that the Board diluted African-American voting strength by combining three of the house districts to which they object.[8] Appellants maintain that, had the Board

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[7] This Court has generally defined "influence districts" as districts "in which [African-American voters] would have constituted an influential *minority*." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (emphasis in original). Districts in which minority voters constitute a majority are generally referred to as "majority-minority districts." *Id.*

[8] Pursuant to Article XI, §11 of the Ohio Constitution, senate districts are composed of three contiguous house districts.

created three house "influence districts" in Franklin County, those districts could have been combined to create a stronger senate "influence district." Jurisdictional Statement at 9. In making this argument, Appellants implicitly concede that SD15 could not have been configured as a majority-minority district. Indeed, their proposed alternative district does not contain a majority of African-American population.

Moreover, the percentage of African-American population and African-American voting age population contained in new SD15 is virtually identical to the percentage of African-American population and voting age population contained in old SD15. Indeed, new SD15 contains *only .04% less* African-American voting age population than the prior district. Senator Ben Espy, who was the African-American voters' candidate of choice, had been repeatedly elected from old SD15. Appellant Miller handily won both the 2002 Democratic primary and the November 2002 general elections for new SD15, and is now a member of the Ohio Senate from that district.[9]

Hamilton County House Districts. Appellants asserted in their Second Amended Complaint that the Board should have created "two majority-minority districts and . . . a third district in which African-Americans could influence the outcome of the election" in Hamilton County. As shown in the chart above, the 2001 plan of apportionment as adopted contains two house districts with approximately 49% African-American population. Now, however, Appellants maintain that African-American voters "are packed into those two districts, which are nearly 50% African-American." Jurisdictional Statement at 9. Appellees are unable to divine any

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[9] Although the November 2002 general election occurred following the trial in this action, it occurred well before the District Court issued its decision herein. This Court can take judicial notice of election results. See *Solomon v. Liberty County*, 957 F.Supp. 1522, 1556 (N.D.Fla. 1997), *aff'd*, 221 F.3d 1218 (11th Cir. 2000) (*en banc*).

legal theory which supports the proposition that too many minority voters were "packed" into certain "influence districts," while at the same time demanding that even more minority voters be drawn into those same districts to make them majority-minority districts.

Appellants also assert that the Board should have created a third "influence district" in Hamilton County. *Id.* The record below established, however, that this third district could not have been created consistent with the Ohio Constitution. Moreover, Handley found that African-American voters' candidates of choice won seven of the ten election contests she analyzed in Hamilton County. When taken as a whole, Appellants' arguments with respect to Hamilton County are simply nonsensical.

Mahoning County House District. Appellants have consistently acknowledged that African-Americans cannot possibly constitute a majority in any conceivable house district in Mahoning County. Nevertheless, Appellants maintain that the Board violated §2 of the Voting Rights Act by creating HD60 with "an African American population of only 33.6%." Jurisdictional Statement at 8. Appellants further suggest that any lessening of the African-American population in the district approved in *Armour v. Ohio,* 775 F.Supp. 1044 (N.D.Ohio 1991), to remedy §2 and state and federal constitutional violations found in the *1981 Democrat apportionment plan,* somehow violates "the continuing remedial goals of *Armour* . . . ." Jurisdictional Statement at 8.

Initially, it must be observed that the difference in both African-American population and African-American voting age population between HD60 in the adopted plan of apportionment and HD62 in the alternative Herington/ DePiero plan proffered by Appellants *is less than one percent.* Moreover, both the percentage of African-American population and the percentage of African-American voting age population in Appellants' proposed HD62 is less those

percentages for the house district approved in *Armour*. Under the plan as adopted, 93% of the African-American population in Mahoning County is contained in HD60, and Borgemenke testified that he simply refused to "reach a finger out and find where every African-American lives in Mahoning County and draw a snake to get to them."

Finally, as the testimony of Representative (and Plaintiff-Appellant herein) Sylvester Patton ("Patton") demonstrated, Appellants' only real complaint with respect to HD60 was the inclusion of Youngstown's Ward 4 in the district. Patton, however, handily won both the 2002 Democratic primary and general elections in new HD60 and continues to serve in the Ohio House from the district. The inclusion of Ward 4 in HD60 was required to avoid splitting the City of Youngstown in violation of Article XI, §7(C) of the Ohio Constitution,[10] and importantly, Ward 4 is also included in Appellants' proposed HD62 under the Herington-DePiero Plan.

Montgomery County Senate District. Appellants assert that SD5 is an example of "classic gerrymandering," because the district is formed by combining two Montgomery County house districts with a third house district adjacent to Montgomery County. Jurisdictional Statement at 10. Appellants fail, however, to advise the Court of several important considerations that governed the drawing of SD5.

Montgomery County contains five whole house districts. Accordingly, one senate district must be comprised of three house districts located entirely within the county, Ohio Const., Art. XI, §11, and the remaining two house districts must be combined with an adjacent house district located outside of the county. *Id.* Under the 2001 plan as adopted, as under the 1991 plan, the two house districts containing the

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[10] Significantly, it was the Dykes-drawn 1981 plan of apportionment's violation of this provision–Ohio Const., Article XI, §7(C)–in Mahoning County that the *Armour* Court concluded constituted a violation of the U.S. Constitution's Fifteenth Amendment. *Armour*, 775 F.Supp. at 1061.

bulk of the City of Dayton were combined with the house district to the north of the county.

Significantly, Appellants have consistently conceded that SD5 cannot be reconfigured as a majority-minority district. In fact, Appellants' proposed alternative SD5 contains a *smaller* percentage of African-American voting age population than does the district contained in the plan as adopted. Moreover, although the 1991 district contained only 27.21% African-American voting age population, the candidate of choice of African-American voters, former Senator (and Plaintiff-Appellant herein) Rhine McLin ("McLin"), won the seat in 1994 with more than 51% of the vote and in 1998 with more than 61% of the vote.[11] Upon McLin's election to the office of Mayor of the City of Dayton in 2001, former Representative Tom Roberts ("Roberts") was appointed to fill the remainder of her Senate term (in old SD5), and Roberts, who, like McLin, is African-American, was elected in 2002 to a full term in the Ohio Senate *from new SD5*. Indeed, Appellants' expert Handley found that African-American voters' candidates of choice won seven of the eight Montgomery County races that she analyzed.

F. Appellants' Evidence of Racial Bloc Voting

In their Jurisdictional Statement, Appellants scarcely mention the third "*Gingles* precondition"—that the white majority votes sufficiently as a bloc to usually enable it to defeat the minority's preferred candidate.[12] Indeed, Appellants' only mention of the issue is their cursory statement that "[t]he evidence presented by Appellants in the instant case establishes that in each of the four counties, African-

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[11] In winning the seat, McLin received significant support from white voters, including white voters from the "predominantly Republican" parts of the district outside of Montgomery County.

[12] As discussed below, this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), set forth three "preconditions" plaintiffs must establish when presenting a challenge under §2 of the Voting Rights Act.

Americans are politically cohesive and voting is racially polarized." Jurisdictional Statement at 22. As detailed in Judge Gwin's concurring opinion below, *Parker,* 263 F.Supp.2d at 1113-15, App. at 24a-27a, however, nothing could be further from the truth.

Appellants presumably base their unfounded assertion on the report of their expert, Dr. Handley. Handley defined "polarized voting" as election contests in which "black and white voters preferred different candidates . . . ," and concluded that most of the races she analyzed were "racially polarized" under this definition. Handley never opined, however, that the degree of "racial polarization" she found was "legally significant." Indeed, *Handley testified that she was offering no opinion on whether legally significant racial bloc voting existed in the challenged districts.* In fact, *Handley did not even review the 2001 plan of apportionment,* and offered no opinion on whether the plan violated §2 of the Voting Rights Act. Significantly, Appellants acknowledge to this Court that, "[i]n terms of the districts analyzed, the choice of African-American voters usually prevailed." Jurisdictional Statement at 22. Given this evidence from Appellants' own expert, their §2 claims were properly doomed to fail, and this Court should, therefore, summarily affirm the decision of the court below.[13]

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. INTRODUCTION

In an attempt to convince this Court that an important, unresolved issue of law requires the Court's attention, Appellants devote most of their Jurisdictional Statement to presenting their arguments on two issues, neither of which, even if

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[13] Both Handley's testimony, and the report and testimony of Appellees' expert, Dr. Gary King ("King") are discussed in greater detail below, *infra* at 20-24.

resolved in Appellants' favor, would result in Appellants prevailing on their claims: (1) whether circuit court decisions are controlling authority for three-judge districts courts within their jurisdiction, and (2) whether so-called "influence claims" are cognizable under §2 of the Voting Rights Act of 1965. In their zeal to convince this Court that these issues warrant plenary review, Appellants simply gloss over the numerous other fatal deficiencies in not only their §2 claims, but in all of their claims, and ignore the complete lack of evidence supporting those claims. Accordingly, the Court need not resolve either of these suggested issues.

Appellants failed to introduce any evidence establishing the third *Gingles* precondition—that white voters vote sufficiently as a bloc to enable them to usually defeat the minority group's candidate of choice. Accordingly, it is entirely irrelevant whether the District Court herein treated the Sixth Circuit's decision in *Cousin v. Sundquist,* 145 F.3d 818 (6th Cir. 1998), *cert. denied,* 525 U.S. 1138 (1999), as controlling authority. Like the Sixth Circuit, most courts that have considered the viability of "influence claims" have rejected such claims. Appellants, having "failed to demonstrate *Gingles'* third precondition," *Voinovich,* 507 U.S. at 158, the issue of whether the court below treated *Sundquist* as "controlling authority," or as merely another decision in an overwhelming line of "persuasive authority" rejecting "influence claims," is simply of no consequence. Appellants simply cannot prevail on any of their claims. This Court should, therefore, summarily affirm the decision of the District Court.

II. SECTION 2 PLAINTIFFS ARE REQUIRED TO SHOW THAT AFRICAN-AMERICANS COULD CONSTITUTE A MAJORITY IN AN ALTERNATIVE DISTRICT.

"Congress enacted §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or

abridged . . . on account of race, color, or previous condition of servitude.'" *Voinovich*, 507 U.S. at 152 (citation omitted). Contrary to Appellants' assertions, the proof required to establish a claim under §2 is now well-established:

> In *Thornburg v. Gingles*, [478 U.S. 30 (1986)], this Court held that Plaintiffs claiming vote dilution through the use of multimember districts must prove three threshold conditions. First, they must show that the minority group "'is sufficiently large and geographically compact to constitute a majority in a single-member district.'" Second, they must prove that the minority group "'is politically cohesive.'" Third, the plaintiffs must establish 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'"

Voinovich, 507 U.S. at 157 (citations omitted). In *Growe v. Emison*, 507 U.S. 25, 39-40 (1993), the Court "held that the *Gingles* preconditions apply in challenges to single-member as well as multimember districts." *Voinovich*, 507 U.S. at 158 (citation omitted). Plaintiffs bear the burden of establishing the three *Gingles* preconditions. *Voinovich*, 507 U.S. at 156. With respect to the first *Gingles* precondition, §2 plaintiffs bear the burden of establishing that a majority-minority district can be drawn as a remedy. See *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997) ("[A] §2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.") (citation omitted).

Appellants correctly note that this Court has reserved the question of whether proof of the first *Gingles* precondition is necessary in all §2 cases, or "whether influence-dilution claims . . . are viable under §2." *Voinovich*, 507 S.Ct. at 154. The vast majority of circuit and district courts that have considered the issue, however, have ruled that such claims are not viable. See *Metts v. Almond*, 217 F.Supp.2d 252, 257 (D.R.I. 2002) ("[E]very circuit and most district courts that

have addressed the issue have held that claims based on an alleged ability to influence the election of candidates are not cognizable under Section 2."). See also *O'Lear v. Miller*, 222 F.Supp.2d 850 (E.D.Mich), *aff'd*, 537 U.S. 997 (2002). Should this Court find it necessary to reach this question, it should resolve it consistent with the vast majority of courts that have considered the issue.

Appellants' "influence claims" are of two distinct types, depending upon the particular district being challenged. In Mahoning County, for example, Appellants assert that the Apportionment Board impermissibly divided a group of African-American voters—by failing to reach out and include small, isolated enclaves of African-American voters in violation of the provisions of the Ohio Constitution—even though the addition of those African-American voters would not have resulted in the creation of a majority-minority district. Appellants allege, in other words, that the Board unlawfully divided a cohesive group of minority voters even though those voters could not have constituted a majority in any alternative single-member district.

In other districts, like the house districts being challenged in Franklin County, Appellants assert that African-American majorities–or near majorities—*should be divided* between more districts to create more "influence districts" and fewer (or no) majority-minority districts. As Appellants readily acknowledge, this latter theory rests on the assumption of significant white cross-over voting in support of the minority's preferred candidate. Jurisdictional Statement at 22.

In this respect, Appellants' §2 claims are, at least in part, similar to the claim rejected by this Court in *Voinovich*:

> [Plaintiffs] in this case, however, do not allege that Ohio's creation of majority-black districts prevented black voters from constituting a *majority* in additional districts. Instead, they claim that Ohio's plan deprived them of "influence districts" in which they would have

> constituted an influential *minority*. Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters.

Voinovich, 507 U.S. at 154 (emphasis in original). As in *Voinovich*, the fatal flaw with Appellants' theory of their §2 claims is that it presupposes the existence of a condition—significant white cross-over voting—that necessarily negates the third precondition of a §2 claim—legally significant white bloc voting. See *Voinovich*, 507 U.S. at 158.

As discussed below, Appellants' failure to establish legally significant white bloc voting defeats their §2 claims, whether those claims are "influence claims" or the more traditional §2 claims dealing with majority-minority districts. Plenary review by this Court is not, therefore, warranted.

As the only support for their novel "influence claims," Appellants cite this Court's recent decision in *Georgia v. Ashcroft*, 123 S.Ct. 2498 (2003), and the decision of the New Jersey Supreme Court *McNeil v. Legislative Apportionment Comm'n of N.J.*, 177 N.J. 364, 828 A.2d 840 (2003). In *Ashcroft*, the Court ruled that, when determining whether a new legislative redistricting plan constitutes "retrogression" in violation of §5 of the Voting Rights Act, 42 U.S.C. §1973c, "a court must examine whether a new plan adds or subtracts 'influence districts'–where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Ashcroft*, 123 S.Ct. at 2512.[14]

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[14] Citing *Ashcroft*, the New Jersey Supreme Court held in *McNeil* that a state redistricting body could properly defend against a traditional §2 claim–one challenging the state's failure to create majority-minority districts–by showing that it "distribut[ed] the voting strength of minority groups not only into majority safe districts but also into coalition or

Appellants' reliance on *Ashcroft* and *McNeil* is misplaced. Nothing in this Court's decision in *Ashcroft* suggests that states have an *affirmative §2 obligation* to distribute minority voters across a greater number of districts, as Appellants here urge. Rather, the Court merely held that states could avoid §5 liability by demonstrating non-retrogression, and that such non-retrogression could include the creation of "influence districts."

> In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts in which it is highly likely that minority voters will be able to elect candidates of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.
>
> *Section 5 does not dictate that a State must pick one of these methods of redistricting over another.* Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success."

Ashcroft, 123 S.Ct. at 2511-12 (emphasis added) (citations omitted). See *Hall v. Virginia*,—F.Supp.2d—, 2003 WL 21957378 (E.D.Va. Aug. 7, 2003) (rejecting the argument that *Ashcroft* authorizes §2 claims for "influence" or "coalition districts").

Indeed, *requiring* states to create influence districts demanded by various groups of minority voters, or face §2

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influence districts . . . ." *McNeil*, 177 N.J. at 384. The New Jersey court called such distribution of minority voters "a tool . . . which the states *must* be free to employ if they deem it appropriate in order to protect and promote the electoral rights and interests of minority groups." *Id.*, 177 N.J. at 384 (emphasis in original).

liability, would, in effect, absolve a §2 plaintiff of "at least the initial burden of proving an apportionment's invalidity," a burden that rests "squarely on the plaintiff's shoulders." *Voinovich*, 507 U.S. at 155. As Judge Graham noted in his concurring opinion in the court below:

> If influence claims are permitted, then any system of districtring, no matter how fair and impartial in its conception, is subject to attack unless it pools minority voters in sufficiently large enclaves so that they can "influence" the result of elections. This would transfer the principle of "one man--one vote" into "one group—one election victory."

Parker, 263 F.Supp.2d at 1108, App. at 14a (Graham, J., concurring) (footnote omitted). Such a result would contradict this Court's oft-repeated admonition that "the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich*, 507 U.S. at 156 (citation omitted).

> Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, §2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate §2; where such an effect has not been demonstrated, §2 simply does not speak to the matter.

Voinovich, 507 U.S. at 155 (citation omitted) (emphasis in original).[15]

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[15] Moreover, *requiring* the state to create influence districts would transform the *McNeil* Court's "unpacking tool" available to the states into a "club" to be used against states regardless of the reasonableness of their redistricting plans.

As noted above, this Court need not reach the issue of whether "influence claims" are viable under §2 of the Voting Rights Act. Nevertheless, should this Court deem it necessary to resolve that issue, it should join the vast majority of courts that have considered the issue and reject such claims.

III. APPELLANTS FAILED TO ESTABLISH LEGALLY SIGNIFICANT WHITE BLOC VOTING IN ANY OF THE CHALLENGED DISTRICTS.

As noted above, this Court "need not decide how *Gingles*' first factor might apply here . . . because [Appellants] have failed to demonstrate *Gingles*' third precondition–sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich*, 507 U.S. at 158. A majority of the three-judge District Court below concluded that Appellants' §2 claims failed because they had failed to establish legally significant white bloc voting. See *Parker*, 263 F.Supp.2d at 1108 (Graham, J., concurring), 263 F.Supp.2d at 1113-15 (Gwin, J., concurring).[16] On appeal, Appellants simply gloss over this glaring deficiency in their §2 claims.

The final two *Gingles* pre-conditions require an examination of whether voting in elections for seats in the Ohio General Assembly is "racially polarized."

> The purpose of inquiring into the existence of racially polarized voting is two-fold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. Thus, the question whether a given district experiences legally significant racially polarized voting

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[16] Chief Judge Martin, in his opinion for the three-judge District Court, declined to reach the issue. See *Parker*, 263 F.Supp.2d at 1105.

> requires discrete inquiries into minority and white voting practices.

Gingles, 478 U.S. at 56 (citations omitted).

> Both the second and third *Gingles* pre-conditions . . . require a court to consider the voting behavior of different races. However, the inquiry in the second pre-condition differs from that involved in the third: the former asks merely whether voters of the same race tend to vote alike, and the latter evaluates whether "a bloc-voting majority can routinely outvote" the minority, thereby "impair[ing] the ability of a protected class to elect candidates of its choice."

Sundquist, 145 F.3d at 823 (citations omitted). "[T]he question here is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994). "[B]loc voting [is] a matter of degree, with a variable legal significance depending on other facts . . . ." *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994) (citation omitted). "[I]n general, a white bloc vote that normally will defeat the combined strength of minority vote support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56.

In the case at bar, Appellants offered no evidence of legally significant racial bloc voting for any of the districts at issue herein, and indeed, the evidence they did introduce *proved that no such bloc voting exists in the challenged districts.* Appellants' expert, Dr. Handley, testified that she has no opinion as to whether there is legally significant racial bloc voting in any of the districts:

Q. Now, in your report, Dr. Handley, you do not issue any opinion as to whether there's legally significant racial bloc voting do you?

A. I do not.

Tr. at 207. Indeed, Handley did not review the 2001 plan of apportionment to determine whether it violated §2 of the Voting Rights Act:

Q. Now, you have not reviewed in any detail the 2001 apportionment plan, have you?

A. I have not.

Q. And you are not opining as to the 2001 apportionment plan as adopted as respects the Voting Rights Act, are you?

A. That's correct.

Tr. at 224.

Moreover, in her report, Pl.Ex. 33, Handley affirmatively opined that voting in Mahoning County was *not* racially polarized. With regard to Franklin County, Handley opined, that "[d]espite polarized voting, the black preferred candidate won most of these contests because the candidates were competing in effective black districts." With respect to Hamilton County, Handley concluded that "[t]he black-preferred candidate won all of the contests in districts with significant black populations . . . ." She reached a similar conclusion with regard to Montgomery County: "Despite polarized voting, the black-preferred candidate won all but one of these contests because the candidates were competing in effective black districts," even though "[b]lacks did not constitute a majority of the voting age population in any of the three effective districts."

Thus, with respect to voting *in every county in which the districts challenged by Appellants are located,* Handley essentially concluded that the white majority does not "vote[ ] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," *Voinovich,* 507 U.S. at 157 (citation omitted). Indeed, in her report, Handley summarized her findings as follows:

> In fact, black voters are quite successful at electing black-preferred candidates in districts significantly less

> than majority black. This is because *there is often a substantial amount of white crossover voting for black-preferred candidates.*

Pl.Ex. 33 at 2 (emphasis added).[17] Handley found that the candidate preferred by African-American voters won twenty-five (25) of the thirty (30) elections she analyzed and for which her analysis provided "reliable estimates." Such results can hardly be considered evidence of legally significant white bloc voting. See *Johnson v. Hamrick*, 296 F.3d 1065, 1077 (11th Cir. 2002) (Plaintiffs failed to establish legally significant white bloc voting where "the candidate preferred by black voters wins as often as he or she loses, 45.5% of the time.") (citation omitted).

Indeed, although African-Americans constitute only 11.46% of the statewide population, and only 10.47% of the state's voting age population, 14 of 99 (14.1%) Ohio House seats and 4 of 33 (12.1%) Ohio Senate seats are currently held by African-Americans. See *DeGrandy*, 512 U.S. at 1000 (§2 claim may be defeated by a showing that minority group can elect its candidate of choice in a number of districts roughly proportional to the minority group's population in the state as a whole). "It is obvious that unless minority group members experience difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Gingles*, 478 U.S. at 48 n.15. See also *Cano v. Davis*, 211 F.Supp.2d 1208, 1231 (C.D.Cal. 2002) ("Of course, if minority-preferred candidates actually win elections, then the minority is able to elect representatives of its choice."), *aff'd*, 537 U.S. 1100 (2003).

> Plaintiffs' evidence does show that Latinos prefer Latino candidates in far higher proportions than do non-Latinos;

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[17] Handley's report and testimony is consistent with *Appellants' allegation* that "[t]here is significant non-African-American cross-over vote in many parts of Ohio that elects African-Americans to state legislative office." Second Amended Complaint at 8, 33.

> but it also shows that substantial numbers of non-Latinos support Latino candidates, with the result that the Latino candidates actually win elections. Thus, the evidence of racial polarization is insufficient *as a matter of law* to establish the "effects" required in a vote dilution case.

Cano, 211 F.Supp.2d at 1238 (emphasis added).

Appellants' own expert concluded, in effect, that legally significant white bloc voting did not exist in any of the challenged districts. Even if Handley's report were somehow considered sufficient to facially satisfy the third *Gingles* pre-condition, it was overwhelmingly rebutted by the report and testimony of Appellees' expert, Dr. Gary King ("King").[18]

In contrast to the limited racial bloc voting analysis performed by Handley, King performed an exhaustive analysis considering virtually every state legislative election in the urban counties during the last decade. King noted that Handley only reviewed a small selection of elections and types of races. She ignored races involving only white candidates, regardless of the African-American population in the district.

After reviewing all relevant races, King concluded as follows:

> Quite remarkably, the degree of racially polarized voting when a white Democrat runs against a white Republican (31.7%) is almost the same as the degree of racially polarized voting when a Black Democrat runs against a white Republican (31.8%). This strongly suggests that

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[18] King is the David Florence Professor of Government at Harvard University and the Director of the Harvard-MIT Data Center. King is the "world's foremost authority on the statistical analysis of racial bloc voting. Dr. King's techniques have been widely recognized in the academic community and utilized in other voting rights cases." *Mallory v. Ohio*, 173 F.3d 377, 383 (6th Cir.), *cert denied*, 528 U.S. 951 (1999). Dr. King extensively criticized Handley's report and methodology.

> the race of the candidate has not been a major factor in the elections analyzed.

Def. Ex. C at 17-18.[19] Indeed, King found that, overall, a greater percentage of white voters voted for a black Democratic candidate (52.6%) than voted for a white Democratic candidate (47.7%). In sum, King stated that "[t]he bulk of the substantial evidence provided leads me to conclude that racially polarized voting has not reached levels of legal significance in these elections."

Because both Appellants' and Appellees' evidence established that legally significant racial bloc voting does not exist in the legislative elections in Ohio, Appellants' §2 claims fail as a matter of law. Accordingly, this Court should summarily affirm the decision of the District Court herein.[20]

IV. APPELLANTS FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO SUPPORT THEIR CONSTITUTIONAL CLAIMS.

A. Appellants' Fourteenth Amendment Claim

To establish a Fourteenth Amendment claim under this Court's decision in *Shaw v. Reno,* 509 U.S. 630 (1993),

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[19] In King's report and testimony, "[t]he 'degree of racial bloc voting' is the difference between the percentage of blacks who voted for the Democratic candidate and the percentage of whites who voted for the Democratic candidate . . . ." *Mallory v. Ohio,* 38 F.Supp.2d 525, 538 (S.D.Ohio 1997) (referring to King's ecological regression analysis), *aff'd,* 173 F.3d 377 (6th Cir.), *cert. denied,* 528 U.S. 951 (1999).

[20] Appellees also note that Appellants failed to prove their §2 claims under the "totality of the circumstances." See *Gingles,* 478 U.S. at 79. The only evidence Appellants offered on the "totality of the circumstances" factors, see *Gingles,* 478 U.S. at 36-37, was the report of Professor Paul J. Cook, Sr., of Central State University, which report deals exclusively with the history of racial discrimination *from 1787 to 1920.* This evidence does not establish that African-Americans are currently denied the right to register, vote, or otherwise participate in the electoral process. In fact, Cook expressly acknowledged that he was not rendering any opinions regarding current conditions or behavior.

plaintiffs must establish that "race was the predominant factor motivating the" state's redistricting decisions, or that the state "subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Indeed, in 1997, a three-judge court of the United States District Court for the Northern District of Ohio ruled that compliance with the traditional districting principles contained in Article XI of the Ohio Constitution shields a reapportionment plan from strict scrutiny under Fourteenth Amendment analysis and ultimately defeats a claim of racial gerrymandering. *Quilter v. Voinovich*, 981 F.Supp. 1032, 1044-50 (N.D.Ohio 1997), *aff'd*, 523 U.S. 1043 (1998). This Court recently emphasized the heavy burden on plaintiffs to establish a *Shaw* claim. *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001).

It must be initially observed that Appellants made no claim in this case that the 2001 apportionment plan was based upon anything other than geography. See Second Amended Complaint at 8, 32 ("Upon information and belief, the *Defendants focused solely on geography* in drawing race based legislative districts.") (emphasis added). Significantly, Appellants did not, and do not, assert that the plan violates the Ohio Constitution in any way.

Moreover, Borgemenke, who drafted the 2001 plan of apportionment, testified *without contradiction* that the predominant basis for crafting district lines was Article XI of the Ohio Constitution. The provisions of Article XI of the Ohio Constitution require districts to be based upon geographical and political boundaries and are, therefore, race-neutral. See App. at 29a-35a. Article XI contains detailed restrictions on crafting state legislative districts, thereby limiting the ability of drafters to engage in racial gerrymandering. See *Quilter*, 981 F.Supp. at 1044-45 ("The State of Ohio has established districting criteria to be followed, including the customary principles discussed above, in Article XI of the Ohio Consti-

tution. Many states have codified traditional districting criteria, either in statutes or in constitutions. Ohio, however, appears to have prescribed more extensive and specific criteria than any other state.") (footnote and citations omitted).

Borgemenke had been instructed by members of the Apportionment Board to draw a plan that complied with the Ohio Constitution, and he did so. Indeed, on several occasions, Borgemenke advised Johnson, the NAACP's redistricting coordinator and a consultant engaged by the Republican members of the Task Force, that he could not "reach out" to pick up additional African-American population because doing so would violate the Ohio Constitution. Instead, Borgemenke opted for following the Ohio Constitution "every time," and made no "changes to draw on race."

Compliance with the provisions of Article XI of the Ohio Constitution contravenes the notion "that the state substantially disregarded or neglected traditional districting principles—that race was the *predominant* factor, the criterion that could not be compromised," a showing necessary to invoke strict scrutiny under the Fourteenth Amendment. *Quilter*, 981 F.Supp. at 1048 (emphasis in original) (citation omitted). Because Appellants have failed to introduce any evidence that race was the predominant factor motivating the drawing of district lines under the 2001 plan of apportionment, the District Court below properly rejected their Fourteenth Amendment claim, and this Court should summarily affirm.

B. Appellants' Fifteenth Amendment Claim

Proof of discriminatory intent is required to establish a claim under the Fifteenth Amendment to the United States Constitution. See *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). To establish liability under the Fifteenth Amendment, "plaintiffs had to prove first that vote dilution, as a special form of discriminatory effect, exists and second, that it results from a

racially discriminatory purpose chargeable to the state." *Lucas v. Townsend,* 967 F.2d 549, 551 (11th Cir. 1992) (citing *Washington v. Finlay,* 664 F.2d 913, 919 (4th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982)). "This Court has not decided whether the Fifteenth Amendment applies to vote dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment." *Voinovich,* 507 U.S. at 159 (citation omitted).

C. Appellants' Evidence of Intentional Discrimination

Appellants cite to only two pieces of evidence to support both their Fourteenth and Fifteenth Amendment claims. As the unanimous District Court below held, however, Appellants' evidence was insufficient to support either claim.

Initially, it must be observed that, for the first time in this litigation, Appellants, in their Jurisdictional Statement, assert that the Republican members of the Task Force's engagement of Johnson as a consultant, in and of itself, constituted a violation of the Fourteenth and/or Fifteenth Amendments. In the court below, Appellants maintained that Johnson's actions constituted a breach of trust between him and the NAACP, and that his engagement constituted evidence of intentional discrimination. Appellants did not, however, claim, as they do now, that the very fact of Johnson's engagement constituted intentional racial discrimination in violation of the Fourteenth or Fifteenth Amendments.

Moreover, Appellant's argument in this regard completely eviscerates a required element of unconstitutional discrimination—that there be both discriminatory intent and effect. Appellants made no showing of discriminatory effect, *i.e.,* how Johnson's engagement resulted in districts that dilute African-American voting strength. As discussed in great detail above, Appellants have completely failed to establish that any of the challenged house or senate districts dilute African-American voting strength. Indeed, as noted by Judge

Gwin, African-American General Assembly candidates won 74 of the 84 races involving an African-American candidate from 1992 through 2000, and currently hold seats in both houses of the General Assembly at, or in greater proportion than, the proportion of African-American voting age population in the state as a whole. *Parker,* 263 F.Supp.2d at 1113-14, App. at 24a (Gwin, J., concurring).

Finally, Johnson's engagement by the Republican members of the Task Force simply does not constitute evidence of discriminatory intent. Johnson viewed his engagement by the Task Force as a means of funding his work for the NAACP, and, in fact, his work (office space, computer equipment, software, etc.) had been similarly funded during the last decade's reapportionment, without objection. Although Johnson was compensated out of the appropriation allocated to the Republican members of the Task Force, Johnson attempted to work with members of both political parties.

Appellants' assertion that Johnson and the Republican members of the Task Force attempted to conceal Johnson's consulting contract is ludicrous. Johnson served in the same capacity during the 1991 apportionment process, and his work was similarly funded by the Task Force. His contract was discoverable (and, in fact, was discovered) as a public record. When questioned by Apportionment Board member (and Plaintiff-Appellant herein) Herington at the public hearing on the plan he submitted on behalf of the NAACP, Johnson fully explained the circumstances of his engagement.

Moreover, it must be observed that the NAACP, as an organization, in contrast to the individual Appellants herein, has never objected to Johnson's consulting contract, despite the fact that its existence was known prior to the adoption of the 2001 plan of apportionment, it having been widely reported since at least September 27, 2001, the date it was the subject of a press release issued by the Ohio House and Senate Democratic Caucuses. Indeed, the NAACP endorsed

Johnson's work after his consulting agreement had been reported "in all of the newspapers." The NAACP has not commenced an action against Johnson or sought to intervene herein, and has not done so because it presumably recognizes Johnson's consulting agreement for what it was: a means to fund his work on behalf of the NAACP.

The only other piece of evidence relied upon by Appellants to establish intentional discrimination is the transcript of a telephone call between Brett Buerck ("Buerck"), Chief of Staff of the Ohio House of Representatives, and Doug Mink ("Mink"), an unsuccessful candidate in the 2002 Republican primary for a seat in the House of Representatives from new HD28, one of the challenged districts in Hamilton County. The conversation took place during the first week of March, 2002, *five months after* the 2001 plan of apportionment was adopted by the Board. Buerck had telephoned Mink to convince him to withdraw from a primary contest against the Republican caucus' endorsed candidate. During their conversation, Buerck stated that 13,000 African-Americans had been removed from HD28 and 14,000 Republicans added. As the District Court below recognized, however, an examination of the facts and circumstances surrounding Buerck's statement and the district involved reveals that the statement offers no support for Appellants' claim of intentional discrimination.

Old HD31, which is the district to the south of old HD32 (the new HD28 at issue herein), was unconstitutionally 19% "light" in population. Accordingly, Borgemenke added Ward 24 of the City of Cincinnati, which had been a part of old HD32, to old HD31 (which became HD32 under the 2001 plan). This change had the effect of making old HD32 (new HD28), which was already 8% constitutionally "light" in population, even lighter. Accordingly, Borgemenke added population to new HD28 by including therein whole municipalities, *i.e.*, the northern Cincinnati suburbs. Consequently,

new HD28 contains 14 whole municipalities and the non-contiguous portions of two townships.

Significantly, the difference in African-American voting age population between old HD32 and new HD28 is *only 0.26%*. The district is compact and contiguous, and follows political subdivision boundaries as required by Article XI of the Ohio Constitution. Buerck had absolutely no responsibility for drawing district lines under the 2001 plan of apportionment, and his statement to Mink was simply incorrect.

The record in this case belies any indication of intentional discrimination against African-American voters. The Apportionment Board conducted public meetings throughout the state. Their deliberative meetings in Columbus were also open to the public and were transcribed. In drafting the plan, Borgemenke consulted with Republicans, Democrats, county party chairmen, incumbents, challengers, and others, including Johnson. Moreover, on numerous occasions, he consulted with African-American Democratic incumbents and made several adjustments to his plan as requested by such incumbents. Simply put, there is no evidence that Borgemenke drew district lines with the purpose to discriminate against African-American voters. Accordingly, the District Court correctly rejected Appellants' Fourteenth and Fifteenth Amendment claims, and this Court should summarily affirm the decision of that court.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be summarily affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FRED PARKER, *et al.*,
Appellants,

v.

STATE OF OHIO, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

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MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

Appellants respectfully urge the Court to deny Appellees' motion to summarily affirm the decision below rather than grant plenary review of the important issues raised in this appeal. An extensive response to Appellees' Motion in this Memorandum is not necessary. The summary of the evidence and the explanations of why the questions presented for review are substantial are set forth in Appellants' Jurisdictional Statement. The statement of the case and legal arguments set forth in the Jurisdictional Statement on all questions presented for review are hereby offere in response to Appellees' Motion. In addition, Appellants offer the following comments with respect to analysis of "influence" claims under Section 2 of the Voting Rights Act of 1965, as amended.

Although having been presented in other cases with the opportunity to address whether "influence" claims are cognizable under Section 2 of the Voting Rights Act, the Court has declined to do so, reserving the question for another day and another case. This is that case.

In *Thornburg v. Gingles*, 478 US 30 (1986), at n.12, the court stated:

> 12. . . . We have no occasion to consider whether §2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that *is not sufficiently large* and compact *to constitute a majority in a single-member district*, alleging that the use of a multimember district impairs its ability to influence elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondent's claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote. (Emphasis supplied.)

Subsequently, in *Growe v. Emison*, 507 US 25 (1993), the Court held that the three *Gingles* preconditions applied to a Section 2 challenge to a single member districting plan, at least where minority voters are able to constitute a majority of a district under an alternative plan. The Court, at n.5, noted that it was not addressing whether the *Gingles* preconditions applied to an influence claim:

> 5. Gingles expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure

> impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. *Gingles, supra*, at 46-47, n.12. We do not reach that question in the present case either: although the Emison plaintiffs alleged both vote dilution and minimization of vote influence (in the 1983 plan), the District Court considered only the former issue in reviewing the state court's plan.

Two of the three Judges below determined that an influence claim is not cognizable under Section 2. The third determined that such a claim may be maintained but that plaintiffs' claim failed under the third *Gingles* precondition. However, the instant case, in addition to presenting the question of whether an influence claim is cognizable under Section 2, also presents the question of whether the third *Gingles* precondition, or some variation of it, will apply. The instant case presents a clear opportunity for the Court to answer once and for all whether influence claims are cognizable under Section 2. Only in the event that the Court answers this question in the affirmative does that question regarding the third *Gingles* precondition present itself. That issue may then be addressed by the Court if it deems it appropriate or the issue may be dealt with on remand.

A consideration of what may be the appropriate conditions to be applied under an influence claim should be determined in the light of the Court's pronouncements in earlier cases regarding factors to be considered in any action under Section 2 of the Voting Rights Act. The Court has stated that Section 2 claims require district courts to employ a highly individualist analysis. In this connection, the Court found as follows:

> [I]n evaluating a statutory claim of vote dilution through districting, the trial court is to consider the 'totality of circumstances' and to determine based 'upon a searching practical evaluation of the past and present reality'. . .

> whether the political process is equally open to minority voters. 'This determination is peculiarly dependent upon the facts of each case' . . . and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms. . .[and] particularly familiarity with the indigenous political reality. (*Thornburg*, 478 US 30)

Contrary to Appellees' assertion, Appellants did introduce evidence going to the third *Gingles* precondition. Further, the evidence established that there is polarized voting and that the opportunity of minority voters to elect candidates of their choice is diluted under the adopted state redistricting plan from what it would be under an alternative plan.

Appellees argue that influence claims presume significant white cross-over voting that necessarily negates the third *Gingles* precondition. However, this only points out the fact that the third *Gingles* precondition may be incompatible with an influence claim and new criteria may need to be developed. What constitutes legally significant block voting under such a claim may have a different answer than under the traditional Section 2 claim.

Section 2 of the Voting Rights Act guarantees to minorities an equal opportunity to elect the candidates of their choice. Dilution of minority voting strength may result from placing too few or too many minorities in a legislative district. The purpose of the *Gingles* third precondition is to provide a measure to demonstrate that minority voters are or will be harmed by the challenged districting plan. In a vote dilution case based on too few minority voters being placed in a district (a "fragmenting" claim), if the preferred candidates of minority voters are usually defeated by non-minority voters under an existing plan, then this provides an indication of actual harm. However, the *Gingles* third precondition does not work so well in a dilution claim based on too many minority voters being placed in a district (a "packing" claim).

In a district "packed" with minority voters, the preferred candidate of minority voters will not usually be defeated by non-minority voters. Nonetheless, traditional "packing" claims are treated as cognizable under Section 2. The focus is on whether minority voters "packed" into a district may be placed in redrawn districts without creating districts where the preferred candidates of the minority voters would usually be defeated by non-minority voters. To the extent that minority voters are sufficient in number to comprise a majority in more than one district, this is the case, assuming political cohesiveness.

An "influence" claim is a variation on a "packing" claim. Like a "packing" claim an "influence" claim maintains that too many minority voters have been placed in a district and that it is possible to redraw district lines such that minority voters will have an equal opportunity to elect the candidate of their choice in more than simply the challenged district. The question then becomes what place, if any, the third *Gingles* precondition will play in determining whether the alternative plan makes a difference by preventing dilution of minority voting strength. Indeed, there is a strong and cogent argument that the third Gingles precondition should not be mechanically applied to defeat an otherwise demonstrable claim of dilution of equal opportunity of minorities to elect candidates of their choice. Rigid application of *Gingles* should not be employed to cut short consideration of other types of claims which fulfill the venerable purposes of the Voting Rights Act. For these reasons, the treatment by the Court below of the third *Gingles* precondition is not dispositive of Appellants' claims.

CONCLUSION

For all the foregoing reasons, Appellees' Motion to Affirm should be denied.

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